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PREPARATORY COMMITTEE ON THE
ESTABLISHMENT OF AN
INTERNATIONAL CRIMINAL COURT
16 March-3 April 1998

REPORT OF THE INTER-SESSIONAL MEETING FROM 19 TO 30 JANUARY 1998 IN ZUTPHEN, THE NETHERLANDS

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I. INTRODUCTION

1. At the initiative of the Chairman of the Preparatory Committee, Mr. Adriaan Bos, an inter-sessional meeting took place at Zutphen, the Netherlands, from 19 to 30 January 1998. The members of the Bureau, chairs of different working groups, coordinators and the Secretariat participated in the meeting.

2. The purpose of the meeting was to facilitate the work of the last session of the Preparatory Committee scheduled to take place from 16 March to 3 April 1998 (March/April session) by performing the following tasks:

(a) Considering the structure of the Statute and the placement of the articles;

(b) Identifying relationships between articles, including possible overlaps and inconsistencies; and

(c) Considering the required degree of detail in the articles and whether some articles or their more detailed versions could be placed in an instrument other than the Statute.

3. Thus far, the Preparatory Committee has considered various parts and articles of the Statute separately and at different stages. Therefore, the Group participating in this inter-sessional meeting (the Group) found it useful to place before the last session of the Preparatory Committee a complete set of articles so as to provide an overview of the Statute as a whole and to make it easier to identify the relationship between the articles. The present document also contains proposals on articles which have not been discussed in the Preparatory Committee in 1997 in an attempt to present a practical working document for the discussions at the March/April session.

4. The texts of the articles before the Preparatory Committee may be divided into four categories: texts proposed by the working groups of the Preparatory Committee; texts proposed in A/AC.249/1998/WG.7/CRP.1 on the composition and administration of the Court and A/AC.249/1998/L.11 on the final clauses; texts proposed by the International Law Commission (ILC); and texts proposed by delegations during the 1996 sessions (A/51/22, vol. II) and those submitted during the 1997 sessions of the Preparatory Committee. The texts are included as follows:

(a) Text of articles contained in the reports of the working groups (A/AC.249/1997/L.5, L.8/Rev.1 and L.9/Rev.1);

(b) Text of articles contained in A/AC.249/1998/L.11 and A/AC.249/1998/WG.7/CRP.1 in the absence of texts contained in (a);

(c) Text of the ILC draft together with the texts proposed by delegations in 1996-1997 (A/51/22, vol. II and DP series) in the absence of texts contained in (a) and (b);

(d) Texts proposed by delegations in 1996-1997 (A/51/22, vol. II and DP series) in the absence of any other texts contained in (a), (b) and the ILC draft.

5. Comments and suggestions by the Group are indicated by a Nota Bene (N.B.) which appears in bold next to the text to which it applies.

6. The substance of the articles has not been changed. In some places, the wording of the texts has been slightly modified for the purposes of consistency or of reflecting discussions in the Preparatory Committee. Where suggestions for deletions or adjustments affect phrases and sentences, the latter have been retained but stricken through with the Group's suggestion next to them. Some obviously necessary editorial changes have been made. As far as possible, the format of the texts developed by the working groups has been harmonized. Some footnotes which had become obsolete in the light of subsequent discussions have been deleted.

7. The Group suggests that the Statute be entitled "Statute for the International Criminal Court" and be divided as follows:

Preamble

Part 1. Establishment of the Court

Part 2. Jurisdiction, admissibility and applicable law

Part 3. General principles of criminal law

Part 4. Composition and administration of the Court

Part 5. Investigation and prosecution

Part 6. The trial

Part 7. Penalties

Part 8. Appeal and review

Part 9. International cooperation and judicial assistance

Part 10. Enforcement

Part 11. Final clauses

8. The Group's suggestions for titles constitute an attempt to present the articles in an easily identifiable manner to the Preparatory Committee at the March/April session. Once there is agreement on the contents of the parts and the articles, their titles could be reconsidered.

9. The Group suggests placing "Jurisdiction, admissibility and applicable law" and "General principles of criminal law" as parts 2 and 3 because of the substantive issues they address. Thereafter follows part 4, "Composition and administration of the Court", which addresses more structural and procedural issues. The Group, however, recognizes that there may also be reasonable grounds for placing part 4 before part 2.

10. In reviewing the articles of the Statute, the Group is of the view that it would be useful to attempt, to the extent possible, to have a balanced Statute in terms of the level of detail in the articles of various parts. The Group believes that in a number of articles, the principles of the issues with which they deal should be placed in the Statute, while details could more usefully be addressed elsewhere, such as in the Rules. In several places the Group has made suggestions to that effect in an N.B.

11. Where the Group has identified particular links between the articles, possible overlaps or inconsistencies, they have been indicated in an N.B.

12. The articles have been renumbered and the text and footnotes adjusted accordingly. Throughout the text, the previous numbers of the parts and articles appear in square brackets next to the new numbers.

13. For ease of reference, the report also includes a draft Final Act and a draft resolution for the establishment of a Preparatory Commission, as contained in document A/AC.249/1998/L.11, for consideration by the Preparatory Committee.

14. The Group expresses its appreciation to the Government of the Netherlands for its generosity and hospitality in organizing the inter-sessional meeting at Zutphen.

II. DRAFT STATUTE FOR THE INTERNATIONAL CRIMINAL COURT

PREAMBLE

N.B. The preamble was not considered by the Preparatory Committee in 1997.

ILC draft

The States Parties to this Statute,

Desiring to further international cooperation to enhance the effective prosecution and suppression of crimes of international concern, and for that purpose to establish an international criminal court;

Emphasizing that such a court is intended to exercise jurisdiction only over the most serious crimes of concern to the international community as a whole;

Emphasizing further that such a court is intended to be complementary to national criminal justice systems in cases where such trial procedures may not be available or may be ineffective;

Have agreed as follows:

Other proposals contained in A/51/22, vol. II[1]

Desiring to further international cooperation ...;

Emphasizing that such a court is intended ...;

[Recognizing that it is the primary duty of States to bring to justice persons responsible for such serious crimes;]

Emphasizing further that such a court is intended to be complementary to national criminal justice systems [in cases where such systems may be ineffective and/or in cases where national jurisdiction is unavailable] [in cases where such trial procedures may not be available or may be ineffective];

or

Emphasizing further that the international criminal court shall complement national criminal justice systems when they are unable or unwilling to fulfil their obligations to bring to trial such persons;

---

[1] Pp. 1-2.

PART 1. ESTABLISHMENT OF THE COURT

N.B. The articles in part 1 were not considered by the Preparatory Committee in 1997.

Article 1

The Court

ILC draft

There is established an International Criminal Court ("the Court"), whose jurisdiction and functioning shall be governed by the provisions of this Statute.

Other proposals contained in A/51/22, vol. II[2]

There is established an International Criminal Court ("the Court") [which shall be complementary to national criminal justice systems. Its jurisdiction and functions] (whose jurisdiction and functioning) shall be governed by the provisions of this Statute.

* * *

A Permanent International Criminal Court ("the Court"), whose jurisdiction and functioning shall be governed by the provisions of this Statute, is hereby established.

N.B. It might be useful to include in part 1 an additional article on the organs of the Court, since reference to such organs is already made in articles prior to part 4 where they are listed in article 29[5]. The content of such an article could be decided upon during the discussions on article 29[5] in the March/April session of the Preparatory Committee. In that case, the text of article 29[5] should be harmonized with the new article.

Article 2

Relationship of the Court with the United Nations[3]

ILC draft

The President, with the approval of the States Parties to this Statute ("States Parties"), may conclude an agreement establishing an appropriate relationship between the Court and the United Nations.

---

[2] P. 3.

[3] See also A/AC.249/1998/L.10.

Other proposals contained in A/51/22, vol. II[4]

The Court shall, as soon as possible, be brought into relationship with the United Nations. It shall constitute one of the specialized agencies provided for in Article 57 of the Charter of the United Nations. The relationship shall form the subject of an agreement with the United Nations pursuant to Article 63 of the Charter.

The agreement, proposed by the Presidency of the Court, shall be submitted to the General Assembly of the States Parties for approval. It shall provide the means for establishing effective cooperation between the Court and the United Nations in the pursuit of their common aims. It shall, at the same time, set forth the autonomy of the Court in its particular field of competence, as defined in this Statute.

N.B. To the extent that articles 2 and 3 refer to the conclusion of agreements respectively with the United Nations and the host State, relevant provisions to this effect could be better placed in the final clauses.

Article 3

Seat of the Court

ILC draft

1. The seat of the Court shall be established at ... in ... ("the host State").

2. The President, with the approval of the States Parties, may conclude an agreement with the host State, establishing the relationship between that State and the Court.

3. The Court may exercise its powers and functions on the territory of any State Party and, by special agreement, on the territory of any other State.

Other proposals contained in A/51/22, vol. II[5]

~~1. The seat of the Court shall be established at ... in ... ("the host State").~~

The Presidency of the Court shall submit for the approval of the General Assembly of the States Parties an agreement establishing relations between the host State and the Court.

---

[4] P. 4.

[5] P. 5.

~~2. The Court may also, for a particular case and when travel by the members of the Court is likely to make the proceedings simpler and less costly, sit in a State Party other than the host State.~~

~~The Presidency of the Court shall make inquiries with the State Party that appears likely to receive the Court.~~

~~After the State Party likely to receive the Court has agreed, the decision under the preceding paragraph to hold a session away from the Court's seat shall be taken by the General Assembly of the States Parties, which shall be informed either by one of its members, the Presidency, the Prosecutor or the General Assembly of Judges of the Court.~~

~~With the express agreement of the State Party receiving the Court, the privileges, immunities and facilities provided for in article x shall continue to be effective when the Court holds a session pursuant to the three preceding subparagraphs.~~

~~3. The provisions of paragraph 2 of this article shall also apply to non party States which, after inquiries by the Presidency, state that they agree to receive the Court and to grant the privileges, immunities and facilities provided for in article x.~~

N.B. Article 55[32] (Place of trial), under "Other proposals", contains proposals similar to the deleted texts. Article 55[32] and the Rules might be more appropriate to deal with the issues raised in the deleted texts.

Article 4

Status and legal capacity

ILC draft

1. The Court is a permanent institution open to States Parties in accordance with this Statute. It shall act when required to consider a case submitted to it.

2. The Court shall enjoy in the territory of each State Party such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.

Other proposals contained in A/51/22, vol. II[6]

1. The Court is a permanent institution open to States Parties under the conditions set out in this Statute. It shall act when required to consider a case submitted to it.

---

[6] P. 6.

2. Without prejudice to the provisions of paragraph 1 of this article, the Presidency, the Preliminary Investigations Chambers, the Procuracy and the Registry shall perform their functions at the Court on a permanent basis.

3. When the Presidency considers that the Court's case-load requires the permanent presence of all the judges of the Court, it shall so inform the General Assembly of the States Parties, which may decide that all judges shall perform their duties full-time, for a period determined by the General Assembly or until further notice.

N.B. A number of issues raised in paragraphs 2 and 3 could more appropriately be considered in connection with part 4.

PART 2. JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW

Article 5[20]

Crimes within the jurisdiction of Court

N.B. The text of this introductory article as such was not considered by the Preparatory Committee in 1997.

ILC draft

The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

(a) the crime of genocide;

(b) the crime of aggression;

(c) serious violations of the laws and customs applicable in armed conflict;

(d) crimes against humanity;

(e) crimes, established under or pursuant to the treaty provisions listed in the Annex,[7] which, having regard to the conduct alleged, constitute exceptionally serious crimes of international concern.

Other proposals contained in A/51/22, vol II[8]

The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

(a) the crime of genocide;

(b) crimes against humanity;

(c) the crime of aggression;

(d) serious violations of the laws and customs applicable in armed conflicts;

(e) - grave breaches of the four Geneva Conventions of 12 August 1949;

- grave breaches of article 3 common to the four Geneva Conventions of 12 August 1949.

---

[7] See appendix II of the annex to the ILC draft.

[8] P. 55.

N.B.

- It might be useful to start this part with an article listing the crimes within the jurisdiction of the Court along the lines of the ILC draft. In the light of subsequent discussions, the reference in paragraph (c) should be changed to "war crimes".

- Once a decision is made as to which crimes should be included in the draft Statute, the paragraphs of this introductory article should be adjusted and the subsequent provisions placed in separate articles and numbered accordingly.

- It might be necessary to have a cross-reference to article 63 [44 bis] (Offences against the integrity of the Court) in this part.

Crime of genocide[9]

For the purpose of the present Statute, the crime of genocide means any of the following acts committed with intent[10] to destroy, in whole or in part, a national, ethnical, racial or religious group,[11] as such:[12]

---

[9] See A/AC.249/1997/L.5, p. 3.

[10] The reference to "intent to destroy, in whole or in part ... a group, as such" was understood to refer to the specific intention to destroy more than a small number of individuals who are members of a group.

[11] The Working Group took note of the suggestion to examine the possibility of addressing "social and political" groups in the context of crimes against humanity.

N.B. The need for this footnote should be reviewed in the light of the discussions that have taken place in respect of crimes against humanity.

[12] The Working Group noted that with respect to the interpretation and application of the provisions concerning the crimes within the jurisdiction of the Court, the Court shall apply relevant international conventions and other sources of international law.

In this regard, the Working Group noted that for purposes of interpreting the present article it may be necessary to consider other relevant provisions contained in the Convention on the Prevention and Punishment of the Crime of Genocide, as well as other sources of international law. For example, article I would determine the question of whether the crime of genocide set forth in the present article could be committed in time of peace or in time of war.

~~**Furthermore, article IV would determine the question of whether persons committing genocide or other acts enumerated in the present article [article III of the Genocide Convention] shall be punished irrespective of their status as constitutionally responsible rulers, public officials or private individuals.**~~

(a) Killing members of the group;

(b) Causing serious bodily or mental harm[13] to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group;

[The following acts shall be punishable:

(a) Genocide;

(b) Conspiracy to commit genocide;

(c) Direct and public incitement to commit genocide;

(d) Attempt to commit genocide;

(e) Complicity in genocide.][14]

N.B. The issue of irrelevance of official position has been dealt with in article 18[B.e.] (Irrelevance of official position).

The interrelationship between the various articles of the present Statute would need to be examined in the next phase of the work. For example, the matters dealt with in the first to third paragraphs of the present note would need to be considered in relation to article 14[33] (Applicable law) of the Statute and the provisions dealing with principles of criminal law.

[13] The reference to "mental harm" is understood to mean more than the minor or temporary impairment of mental faculties.

[14] The Working Group will return to the question of the placement of article III of the Genocide Convention once the Working Group on general principles of criminal law has considered this issue in the context of its work.

N.B. See also article 17[B a. to d.] (Individual criminal responsibility).

[[15] Crime of aggression[16] [17]

Note: This draft is without prejudice to the discussion of the issue of the relationship of the Security Council with the International Criminal Court with respect to aggression as dealt with in article 10[23].

1. [For the purpose of the present Statute, the crime [of aggression] [against peace] means any of the following acts committed by an individual [who is in a position of exercising control or capable of directing political/military action in a State]:

(a) planning,

(b) preparing,

(c) ordering,

(d) initiating, or

(e) carrying out

[an armed attack] [the use of armed force] [a war of aggression,] [a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing] by a State against the [sovereignty,] territorial integrity [or political independence] of another State [when this] [armed attack] [use of force] [is] [in contravention of the Charter of the United Nations] [[in contravention of the Charter of the United Nations as determined by the Security Council].]

[For the purposes of this Statute, the crime of aggression is committed by a person who is in a position of exercising control or capable of directing political/military actions in his State, against another State, in contravention to the Charter of the United Nations, by resorting to armed force, to threaten or violate the sovereignty, territorial integrity or political independence of that State.]

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[15] This square bracket closes at the end of paragraph 2.

[16] A/AC.249/1997/L.5, p. 14.

[17] The proposal reflects the view held by a large number of delegations that the crime of aggression should be included in the Statute.

The Working Group considered this crime without prejudice to a final decision on its inclusion in the Statute.

[2. [Acts constituting [aggression] [armed attack] include the following:][18]

[Provided that the acts concerned or their consequences are of sufficient gravity, acts constituting aggression [are] [include] the following:]

(a) the invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

(b) bombardment by the armed forces of a State against the territory of another State [, or the use of any weapons by a State against the territory of another State];

(c) the blockade of the ports or coasts of a State by the armed forces of another State;

(d) an attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

(e) the use of armed forces of one State which are within the territory of another State with the agreement of the receiving State in contravention of the conditions provided for in the agreement, or any extension of their presence in such territory beyond their termination of the agreement;

(f) the action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(g) the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.]]

N.B. Since the report of the Working Group (A/AC.249/1997/L.5), there have been consultations among delegations on the crime of aggression; see A/AC.249/1997/WG.1/DP.20.

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[18] Paragraph 2 of the text reflects the view held by some delegations that the definition should include an enumeration of the acts constituting aggression.

War crimes[19] [20]

For the purpose of ~~this~~ the present Statute, war crimes means: ~~the crimes listed in this article.~~

N.B. The opening clause has been harmonized with the opening clauses of the previous provisions.

A. Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

(a) wilful killing;

(b) torture or inhuman treatment, including biological experiments;

(c) wilfully causing great suffering, or serious injury to body or health;

(d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

(e) compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;

(f) wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;

(g) unlawful deportation or transfer or unlawful confinement;

(h) taking of hostages.

B. Other serious violations of the laws and customs applicable in international armed conflict within the established framework of international law, namely, any of the following acts:

(a)

Option 1

intentionally directing attacks against the civilian population as such, as well as individual civilians not taking direct part in hostilities;

---

[19] A/AC.249/1997/L.9/Rev.1, p. 3.

[20] Views were expressed that certain provisions should be placed within square brackets. The relative placement of the various options does not indicate in any way the measure of support for such options. Some options commanded very limited support.

Option 2

No paragraph (a).

(a bis)

Option 1

intentionally directing attacks against civilian objects which are not military objectives;

Option 2

No paragraph (a bis).

(b)

Option 1

intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which is not justified by military necessity;[21]

Option 2

intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be excessive in relation to the concrete and direct overall military advantage anticipated;[22]

Option 3

intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to

---

[21] It has been accepted that it will be necessary to insert a provision, probably in the general principles section, which sets out the elements of knowledge and intent which must be found to have existed for an accused to be convicted of a war crime. For example: "in order to conclude that an accused had the knowledge and criminal intention required to be convicted of a crime, the Court must first determine that, taking account of the relevant circumstances of, and information available to, the accused at the time, the accused had the requisite knowledge and intent to commit the crime."

N.B. With respect to this footnote see, however, articles 23[H] (Mens rea (mental elements)) and 24[K] (Mistake of fact or of law) which deal with similar issues.

[22] Ibid.

civilian objects or widespread, long-term and severe damage to the natural environment;[23]

Option 4

No paragraph (b).

(b bis)

Option 1

intentionally launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects which would be excessive in relation to the concrete and direct military advantage anticipated;

Option 2

No paragraph (b bis).

(c)

Option 1

attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended;

Option 2

making non-defended localities and demilitarized zones the objects of attack;

(d) killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;

(e) making improper use of flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;

(f)

Option 1

the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies;

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[23] Ibid.

Option 2

the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;

Option 3

(i) the establishment of settlers in an occupied territory and changes to the demographic composition of an occupied territory;

(ii) the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;

Option 4

No paragraph (f).

(g)

Option 1

intentionally directing attacks against buildings dedicated to religion, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not being used at the time for military purposes;

Option 2

intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not being used at the time for military purposes;

(h) subjecting persons who are in the power of an adverse Party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his interest, and which cause death to or seriously endanger the health of such person or persons;

(i) killing or wounding treacherously individuals belonging to the hostile nation or army;

(j) declaring that no quarter will be given;

(k) destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;

(l) declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;

(m) compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;

(n) pillaging a town or place, even when taken by assault;

(o)

Option 1

employing the following weapons, projectiles and material and methods of warfare which are calculated to cause superfluous injury or unnecessary suffering:

(i) poison or poisoned weapons,

(ii) asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices,

(iii) bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions,

(iv) bacteriological (biological) agents or toxins for hostile purposes or in armed conflict,

(v) chemical weapons as defined in and prohibited by the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and On Their Destruction;

Option 2

employing the following weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering:

(i) poison or poisoned weapons,

(ii) asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices,

(iii) bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions,

(iv) bacteriological (biological) agents or toxins for hostile purposes or in armed conflict,

(v) chemical weapons as defined in and prohibited by the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and On Their Destruction,

(vi) such other weapons or weapons systems as become the subject of a comprehensive prohibition pursuant to customary or conventional international law;

Option 3

employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate;

Option 4

employing the following weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate:

or

employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate, such as but not limited to:

(i) poison or poisoned weapons,

(ii) asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices,

(iii) bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions,

(iv) bacteriological (biological) agents or toxins for hostile purposes or in armed conflict,

(v) chemical weapons as defined in and prohibited by the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and On Their Destruction,

(vi) nuclear weapons,

(vii) anti-personnel mines,

(viii) blinding laser weapons,

(ix) such other weapons or weapons systems as become the subject of a comprehensive prohibition pursuant to customary or conventional international law;

(p)

Option 1

committing outrages upon personal dignity, in particular humiliating and degrading treatment;

Option 2

committing outrages upon personal dignity, in particular humiliating and degrading treatment as well as practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity based on racial discrimination;

(p bis) committing rape, sexual slavery, enforced prostitution, enforced pregnancy, enforced sterilization, and any other form of sexual violence also constituting a grave breach of the Geneva Conventions;

(q) utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;

(r) intentionally directing attacks against buildings, material, medical units and transport, and personnel using, in conformity with international law, the distinctive emblems of the Geneva Conventions;

(s) intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;

(t)

Option 1

forcing children under the age of fifteen years to take direct part in hostilities.

Option 2

recruiting children under the age of fifteen years into armed forces.

Option 3

allowing children under the age of fifteen years to take direct part in hostilities.

Option 4

(i) recruiting children under the age of fifteen years into armed forces or groups; or

(ii) allowing them to take part in hostilities;

Option 5

No paragraph (t).

* * *

OPTION I

Sections C and D of this article apply to armed conflicts not of an international character and thus do not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

C. In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(c) taking of hostages;

(d) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

D. Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

(a)

Option 1

intentionally directing attacks against the civilian population as such, as well as individual civilians not taking direct part in hostilities;

Option 2

No paragraph (a).

(b) intentionally directing attacks against buildings, material, medical units and transport, and personnel using, in conformity with international law, the distinctive emblems of the Geneva Conventions;

(c)

Option 1

intentionally directing attacks against buildings dedicated to religion, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not being used at the time for military purposes;

Option 2

intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not being used at the time for military purposes;

(d) pillaging a town or place, even when taken by assault;

(e) committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(e bis) committing rape, sexual slavery, enforced prostitution, enforced pregnancy, enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;

(f)

Option 1

forcing children under the age of fifteen years to take direct part in hostilities;

Option 2

recruiting children under the age of fifteen years into armed forces or groups;

Option 3

(i) recruiting children under the age of fifteen years into armed forces or groups; or

(ii) allowing them to take part in hostilities;

Option 4

No paragraph (f).

(g) ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;

(h) killing or wounding treacherously a combatant adversary;

(i) declaring that no quarter will be given;

(j) subjecting persons who are in the power of another Party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his interest, and which cause death to or seriously endanger the health of such person or persons;

(k) destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;

(l)

Option 1

No provision on prohibited weapons.

Option 2

A reference to arms, in the light of the discussions on paragraph B(o).

OPTION II

Insert the following provisions in section D:

- intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;

- intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment;

- intentionally launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to

civilian objects which would be excessive in relation to the concrete and direct military advantage anticipated;

- slavery and the slave trade in all their forms;

OPTION III

Delete the opening clause of sections C and D.

OPTION IV

Delete section D.

OPTION V

Delete sections C and D.

* * *

Elsewhere in the Statute:

Option 1

The jurisdiction of the Court shall extend to the most serious crimes of concern to the international community as a whole. The Court shall have jurisdiction in respect of the crimes listed in article X (war crimes) only when committed as part of a plan or policy or as part of a large-scale commission of such crimes.[24]

Option 2

The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court shall have jurisdiction in respect of the crimes listed in article X (war crimes) in particular when committed as a part of a plan or policy or as part of a large-scale commission of such crimes.[2]

Option 3

No provision on threshold.

* * *

Article Y

(relating to the part of the Statute dealing with the definition of crimes)

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[24] The view was expressed that the substance and placement of this proposal should be considered.

Without prejudice to the application of the provisions of this Statute, nothing in this part of the Statute shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law.

N.B.

- Article Y could constitute a separate article or could be placed in article 5[20] (Crimes within the jurisdiction of the Court).

- Article 15[A] (3) (Nullum crimen sine lege) and article 14[33] (Applicable law) deal with related issues.

Crimes against humanity[25]

1. For the purpose of the present Statute, ~~any of the following acts constitutes a crime against humanity when committed~~ a crime against humanity means any of the following acts when committed

N.B. This opening clause has been harmonized with the opening clauses of the previous provisions.

[as part of a widespread [and] [or] systematic commission of such acts against any population]:

[as part of a widespread [and] [or] systematic attack against any [civilian] population] [committed on a massive scale] [in armed conflict] [on political, philosophical, racial, ethnic or religious grounds or any other arbitrarily defined grounds]:

N.B. In case the second alternative is retained, its relationship with subparagraph 1(h) should be considered.

(a) murder;

(b) extermination;

(c) enslavement;

(d) deportation or forcible transfer of population;

(e) [detention or] [imprisonment] [deprivation of liberty] [in flagrant violation of international law] [in violation of fundamental legal norms];[26]

(f) torture;

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[25] A/AC.249/1997/L.5, p.4.

[26] It was suggested that this subparagraph does not include freedom of speech and that it includes the unilateral blockade of populations.

(g) rape or other sexual abuse [of comparable gravity,] or enforced prostitution;

(h) persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural or religious [or gender] [or other similar] grounds[27] [and in connection with other crimes within the jurisdiction of the Court];

(i) enforced disappearance of persons;[28]

(j) other inhumane acts [of a similar character] [intentionally] causing [great suffering,] or serious injury to body or to mental or physical health.[29]

[2. For the purpose of paragraph 1:

(a) extermination includes the [wilful, intentional] infliction of conditions of life calculated to bring about the destruction of part of a population;

(b) "deportation or forcible transfer of population" means the movement of [persons] [populations] from the area in which the [persons] [populations] are [lawfully present] [present] [resident] [under national or international law] [for a purpose contrary to international law] [without legitimate and compelling reasons] [without lawful justification];

(c) ["torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person [in the custody or physical control of the accused] [deprived of liberty]; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions [in conformity with international law]]

["torture" as defined in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984];

(d) persecution means the wilful and severe deprivation of fundamental rights contrary to international law [carried out with the intent to persecute on specified grounds];

(e) ["enforced disappearance of persons" means when persons are arrested, detained or abducted against their will by or with the authorization, support or acquiescence of the State or a political organization, followed by a refusal to

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[27] This also includes, for example, social, economic and mental or physical disability grounds.

[28] It was suggested that some more time was needed to reflect upon the inclusion of this subparagraph.

[29] It was suggested that the inclusion of this paragraph should be subject to further clarification. It was also suggested that the list of acts should include institutionalized discrimination.

acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, thereby placing them outside the protection of the law]

["enforced disappearance of persons" as defined in the Inter-American Convention on the Forced Disappearance of Persons of 9 June 1994, as referred to in the Declaration on the Protection of All Persons from Enforced Disappearance (General Assembly resolution 47/133 of 18 December 1992)].

*[30]

[Crimes of terrorism[31]

~~The Court has jurisdiction with respect to the following terrorist crimes:~~ For the purposes of the present Statute, crimes of terrorism means:

N.B. This opening clause has been harmonized with the opening clauses of the previous provisions.

(1) Undertaking, organizing, sponsoring, ordering, facilitating, financing, encouraging or tolerating acts of violence against another State directed at persons or property and of such a nature as to create terror, fear or insecurity in the minds of public figures, groups of persons, the general public or populations, for whatever considerations and purposes of a political, philosophical, ideological, racial, ethnic, religious or such other nature that may be invoked to justify them;

(2) An offence under the following Conventions:

(a) Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation;

(b) Convention for the Suppression of Unlawful Seizure of Aircraft;

(c) Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents;

(d) International Convention against the Taking of Hostages;

(e) Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation;

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[30] The Working Group considered the following three crimes (crimes of terrorism, crimes against United Nations and associated personnel and crimes involving the illicit traffic in narcotic drugs and psychotropic substances) without prejudice to a final decision on their inclusion in the statute. The Working Group also discussed these three crimes only in a general manner and did not have time to examine them as thoroughly as the other crimes.

[31] A/AC.249/1997/L.5, p. 16.

(f) Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf;

(3) An offence involving use of firearms, weapons, explosives and dangerous substances when used as a means to perpetrate indiscriminate violence involving death or serious bodily injury to persons or groups of persons or populations or serious damage to property.]

[Crimes against United Nations and associated personnel][32]

1. For the purpose of the present Statute, "crimes against United Nations and associated personnel" means any of the following acts [when committed intentionally and in a systematic manner or on a large scale against United Nations and associated personnel involved in a United Nations operation with a view to preventing or impeding that operation from fulfilling its mandate]:

(a) murder, kidnapping or other attack upon the person or liberty of any such personnel;

(b) violent attack upon the official premises, the private accommodation or the means of transportation of any such personnel likely to endanger his or her person or liberty.

2. This article shall not apply to a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies.]

[Crimes involving the illicit traffic in narcotic drugs and psychotropic substances][33]

Article 6[21][34]

[Exercise of jurisdiction] [Preconditions to the exercise of jurisdiction]

1. The Court [may exercise its] [shall have] jurisdiction [over a person] with respect to a crime referred to in article 5[20] [(a) to (e) or any combination thereof] [and in accordance with the provisions of this Statute] if:

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[32] A/AC.249/1997/L.5, p. 16.

[33] A/AC.249/1997/L.5, p. 17.

[34] A/AC.249/1997/L.8/Rev.1, p. 3.

[(a) the [matter] [situation] is referred to the Court by the Security Council, [in accordance with article 10[23]] [acting under Chapter VII of the Charter];]

(b) a complaint is lodged by a State Party [two State Parties] [or a non-State Party] in accordance with article 45[25];

[(c) the matter is brought by the Prosecutor, in accordance with article 46[25 bis].]

[2. [In the case of subparagraphs 1 (b) [and (c)],] the Court [may exercise its] [shall have] jurisdiction [only if the States which have jurisdiction over the case in question have accepted the jurisdiction of the Court in accordance with article 9[22] and] [if national jurisdiction is either not available or ineffective] [in accordance with article 11[35]] or if [an interested State] [interested States] [those States] have deferred the matter to the Court.]

[[35]Article 7[21 bis][36]

Preconditions to the exercise of jurisdiction

Opening clause of paragraph 1

Option 1[37]

[In the case of article 6[21], subparagraphs 1 (b) [and (c)],] The Court [may exercise its] [shall have] jurisdiction [over a person] if the following State(s) has/have accepted [the exercise of] the jurisdiction of the Court over the crimes referred to in [article 5[20] (a) to (e) or any combination thereof] in accordance with article 9[22]:

Option 2

[In the case of article 6[21], subparagraphs 1 (b) [and (c)],] the Court [may exercise its] [shall have] jurisdiction [over a person] if the following State(s) has/have accepted the exercise of the jurisdiction of the Court with respect to a case in question which is the subject of a complaint lodged by a State:

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[35] This square bracket ends at the end of article 7[21 bis].

[36] A/AC.249/1997/L.8/Rev.1, p. 3.

[37] Options are not put in square brackets because they are alternatives supported by only some delegations. Some other delegations suggested the deletion of one or more of the options or have suggested other changes within the options.

[(a) [the State that has custody of the suspect with respect to the crime ("custodial State")] [by the State on whose territory the person is resident at the time the complaint is lodged] [in accordance with international law];]

[(b) the State on the territory of which the act [or omission] in question occurred [or if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;]

[(c) if applicable, the State that has requested, under an international agreement, the custodial State to surrender a suspect for the purposes of prosecution, [unless the request is rejected];]

[(d) the State of which the victim is a national;]

[(e) the State of which the [accused] [suspect] of the crime is a national;]

[2. If a State whose acceptance is required for the exercise of the jurisdiction by the Court rejects such acceptance, that State shall so inform the Court [giving reasons thereof].][38]

[3. Notwithstanding paragraph 1, if a State whose acceptance is required has not indicated whether it gives such acceptance or not within a period of (...), then the Court [may] [may not] exercise its jurisdiction accordingly.][39]

[4. When a State that is not a Party to the Statute has an interest in the acts mentioned in the complaint, this State may, by an express declaration deposited with the Registrar of the Court, agree that the Court shall exercise jurisdiction in respect of the acts specified in the declaration.]]

[[40]Article 8[21 ter][41] [42]

Temporal jurisdiction

N.B. This title is suggested if the article is retained.

1. The Court has jurisdiccion only in respect of crimes committed after the date of entry into force of this Statute.

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[38] This paragraph is relevant only to option 2 of the opening clause to paragraph 1.

[39] Ibid.

[40] This square bracket ends at the end of article 8[21 ter].

[41] The issues raised in this article deserve further reflection as to its place in the Statute.

[42] A/AC.249/1997/L.8/Rev.1, p. 5.

[When a State becomes a Party to this Statute after its entry into force, the Court cannot be seized in respect of crimes committed by its nationals or on its territory or against its nationals, unless those crimes have been committed after the deposit by that State of its instrument of ratification or accession.]

[2. The Court has no jurisdiction in respect of crimes for which, even if they have been committed after the entry into force of this Statute, the Security Council, acting under Chapter VII of the Charter of the United Nations, has decided before the entry into force of this Statute to establish an ad hoc international criminal tribunal. The Security Council may, however, decide otherwise.]]

N.B. There is an interrelationship between this article and article 16[A bis] (Non-retroactivity).

[[43]Article 9[22][44]

Acceptance of the jurisdiction of the Court

Option 1[45]

1. A State that becomes a Party to this Statute thereby accepts the [inherent] jurisdiction of the Court with respect to the crimes referred to in article 5[20], paragraphs [(a) to (d) or any combination thereof].

2. With regard to the crimes referred to in article 5[20] other than those mentioned in paragraph 1, a State Party to this Statute may declare:

(a) at the time it expresses its consent to be bound by the Statute; or

(b) at a later time that it accepts the jurisdiction of the Court with respect to such of the crimes as it specifies in the declaration.

3. If under article 7[21 bis] the acceptance of a State that is not a Party to this Statute is required, that State may, by declaration lodged with the Registrar, consent to the exercise of jurisdiction by the Court with respect to the crime. [The accepting State will cooperate with the Court without any delay or exception, in accordance with Part 9[7] of the Statute.]

Option 2

1. A State Party to this Statute may:

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[43] The square bracket ends at the end of paragraph 5 of this article.

[44] A/AC.249/1997/L.8/Rev.1, p. 5.

[45] Options 1 and 2 are not mutually exclusive and could be combined in such a way that option 1 may be used in respect of some crimes and option 2 in respect of other crimes.

(a) at the time it expresses its consent to be bound by the Statute, by declaration lodged with the depositary; or

(b) at a later time, by declaration lodged with the Registrar;

accept the jurisdiction of the Court with respect to [such of] the crimes referred to in [article 5[20] (a) to (e) or any combination thereof] as it specifies in the declaration.

2. A declaration may be of general application, or may be limited to [particular conduct or to conduct] [one or more of the crimes referred to in article 5[20] (a) to (e)] committed during a particular period of time.[46]

3. A declaration may be made for a specified period, in which case it may not be withdrawn before the end of that period, or for an unspecified period, in which case it may be withdrawn only upon giving a six month's notice of withdrawal to the Registrar. Withdrawal does not affect proceedings already commenced under this Statute.[47]

4. If under article 7[21 bis] the acceptance of a State that is not a Party to this Statute is required, that State may, by declaration lodged with the Registrar, consent to the exercise of jurisdiction by the Court with respect to the crime. [The accepting State will cooperate with the Court without any delay or exception, in accordance with Part 9 [7] of the Statute.]

[5. A declaration referred to in paragraphs 1 to 3 may not contain other limitations than those mentioned in paragraphs 1 to 3.]]

[[48]Article 10[23][49]

[[Action by] [Role of] The Security Council] [Relationship between the Security Council and the International Criminal Court]

1. [Notwithstanding article 6[21], [7[21 bis]] [and [9[22]], the Court has jurisdiction in accordance with this Statute with respect to crimes [referred to] [specified] in article 5[20] [as a consequence of the referral of] [on the basis of a [formal] decision to refer] a [matter] [situation] in which one or more crimes appear to have been committed to [the Prosecutor of] the Court by the Security Council [acting under Chapter VII of the Charter of the United Nations] [in accordance with the terms of such referral].

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[46] This paragraph may also apply to option 1.

[47] Ibid.

[48] This square bracket ends at the end of option 2 of paragraph 3.

[49] A/AC.249/1997/L.8/Rev.1, p. 6.

1 bis. [Notification of] [A letter from the President of the Security Council conveying] the Security Council decision to the Prosecutor of the Court shall be accompanied by all supporting material available to the Council.]

1 ter. The Security Council, on the basis of a formal decision under Chapter VI of the Charter of the United Nations, may lodge a complaint with the Prosecutor specifying that crimes referred to in article 5[20] appear to have been committed.]

2.

Option 1

[A complaint of or directly related to [an act] [a crime] of aggression [referred to in article 5[20]] may [not] be brought [under this Statute] unless the Security Council has [first] [determined] [formally decided] that the act of a State that is the subject of the complaint, [is] [is not] an act of aggression [in accordance with Chapter VII of the Charter of the United Nations].

Option 2

[The determination [under Article 39 of the Charter] of the Security Council that a State has committed an act of aggression shall be binding on the deliberation of the Court in respect of a complaint, the subject matter of which is the act of aggression.]

2 bis. [A referral of a matter to the Court or] [A determination] [A formal decision] by the Security Council [under paragraph 2 above] shall not be interpreted as in any way affecting the independence of the Court in its determination of the criminal responsibility of the person concerned.

2 ter. [A complaint of or directly related to an act of aggression brought under this Statute and the findings of the Court in such cases is without prejudice to the powers of the Security Council under Chapter VII of the Charter.]

[[50]3. Option 1

No prosecution may be commenced under this Statute arising from a [dispute or] situation [[pertaining to international peace and security or an act of aggression] which [is being dealt with] [actively] by the Security Council] [as a threat to or breach of the peace or an act of aggression] [under Chapter VII of the Charter], [where the Security Council has decided that there is a threat to or breach of the peace and for which it is exercising its functions under Chapter VII of the Charter of the United Nations], [unless the Security Council otherwise decides] [without the prior consent of the Security Council].

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[50] This square bracket ends at the end of paragraph 3 of option 2.

Option 2

1. [Subject to paragraph 2 of this article], no prosecution may be commenced [or proceeded with] under this Statute [for a period of twelve months] where the Security Council has [decided that there is a threat to or breach of the peace or an act of aggression and], acting under Chapter VII of the Charter of the United Nations, [given a direction] [taken a [formal and specific] decision] to that effect.

2. [Notification] [A formal decision of the Security Council to the effect] that the Security Council is continuing to act may be renewed at intervals of twelve months [by a subsequent decision].]

3. [Should no action be taken by the Security Council in accordance with Chapter VII of the Charter of the United Nations within a reasonable time, the Court may exercise its jurisdiction in respect of the situation referred to in paragraph 1 of this article.]]]

~~Article 0 [24][51]~~

~~Duty of the Court as to jurisdiction~~

~~The Court shall satisfy itself that it has jurisdiction in any case brought before it.~~

N.B. This article seems to be unnecessary in view of a similar text in paragraph 1 of article 12[36] (Challenges to the jurisdiction of the Court or the admissibility of a case) and could therefore be deleted.

Article 11[35][52]

Issues of admissibility[53]

The following draft text represents the results of informal consultations on article 11[35] and is intended to facilitate the work towards the elaboration of the Statute of the Court. The content of the text represents a possible way to address the issue of complementarity and is without prejudice to the views of any delegation. The text does not represent agreement on the eventual content or approach to be included in this article.

[51] A/AC.249/1997/L.8/Rev.1, p. 8.

[52] A/AC.249/1997/L.8/Rev.1, p. 10.

[53] The present text of article 11[35] is without prejudice to the question whether complementarity-related admissibility requirements of this article may be waived by the State or States concerned.

~~1. [On application of the accused or at the request of [an interested State] [a State which has jurisdiction over the crime] at any time prior to [or at] the commencement of the trial, or of its own motion], the Court shall determine whether a case before it is inadmissible.~~

N.B. This paragraph seems to be unnecessary in view of article 12[36] (Challenges to the jurisdiction of the Court or the admissibility of a case) and could therefore be deleted. Subsequent paragraphs have been renumbered accordingly.

1[2]. Having regard to paragraph 3 of the preamble,[54] the Court shall determine that a case is inadmissible where:

(a) the case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

*[55]

(b) the case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;

(c) the person concerned has already been tried for conduct which is the subject of the complaint,[56] and a trial by the Court is not permitted under paragraph 2 of article 13[42];[57]

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[54] Suggestions were made that the principle of complementarity should be further clarified either in this article or elsewhere in the Statute.

[55] The proposal on extradition or international cooperation is not included in the text, subject to the determination of whether the relevant State would be able to present arguments in the procedure on admissibility.

N.B. In the context of this footnote, see also article 12[36](2) (Challenges to the jurisdiction of the Court or the admissibility of a case).

[56] If the Security Council can refer situations to the Court or the Prosecutor can initiate investigations, then the appropriate wording may be considered.

[57] It was noted that article 11[35] should also address, directly or indirectly, cases in which there was a prosecution resulting in conviction or acquittal, as well as discontinuance of prosecutions and possibly also pardons and amnesties. A number of delegations expressed the view that article 13[42], as currently worded, did not adequately address these situations for purposes of complementarity. It was agreed that these questions should be revisited in light of further revisions to article 13[42] to determine whether the reference to article 13[42] was sufficient or whether additional language was needed in article 11[35] to address these situations.

**[58]

(d) the case is not of sufficient gravity to justify further action by the Court.[59]

2[3]. In order to determine unwillingness in a particular case, the Court shall consider whether one or more of the following exist, as applicable:

(a) the proceedings[60] were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court as set out in article 5[20];

(b) there has been an undue delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;

(c) the proceedings were not or are not being conducted independently or impartially and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

3[4]. In order to determine inability in a particular case, the Court shall consider whether, due to a total or partial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

* * *

An alternative approach, which needs further discussion, is that the Court shall not have the power to intervene when a national decision has been taken in a particular case. That approach could be reflected as follows:

"The Court has no jurisdiction where the case in question is being investigated or prosecuted, or has been prosecuted, by a State which has jurisdiction over it."

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[58] Some delegations preferred the inclusion of the following subparagraph: "the accused is not liable under article 84[57] (Rule of speciality) to be prosecuted before or punished by the Court".

N.B. In the light of the text of article 84[57] (Rule of speciality), consideration should be given as to whether this footnote is still necessary.

[59] Some delegations believed that this subparagraph should be included elsewhere in the Statute or deleted.

[60] The term "proceedings" covers both investigations and prosecutions.

Article 12[36][61]

Challenges to the jurisdiction of the Court or the admissibility of a case

1. At all stages of the proceedings, the Court (a) shall satisfy itself as to its jurisdiction over a case ~~pursuant to article 24~~ and (b) may, on its own motion, determine the admissibility of the case pursuant to article 11[35].[62]

N.B. The words "pursuant to article 24" in the second line have been deleted in view of the proposed deletion of this article (Duty of the Court as to jurisdiction), p. ....

2. Challenges to the admissibility of the case, pursuant to article 11[35], or challenges to the jurisdiction of the Court may be made by:

(a) an accused [or a suspect];[63]

(b) [A State] [[An interested] State Party] which has jurisdiction over the crime on the ground that it is investigating or prosecuting the case or has investigated or prosecuted[64]

[a State [State Party] of nationality of a person referred to in paragraph 2 (a) [on the ground that it is investigating or prosecuting the case or has investigated or prosecuted]]

[and a State [State Party] which has received a request for cooperation];

The Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility.

In proceedings with respect to jurisdiction or admissibility, those having submitted the case pursuant to article 6[21],[65] [those non-State parties which

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[61] A/AC.249/1997/L.9/Rev.1, p. 28.

[62] In the light of the wording to be adopted for article 12[36], several draft provisions of the statute may have to be reexamined including article 47[26], paragraph 4, and article 51[27], paragraph 2 (b).

[63] The term "suspect" includes a person who is the subject to an investigation. Another option is to limit the right to challenge to a suspect arrested on the basis of a pre-indictment arrest warrant.

[64] The final wording of this subparagraph will depend on the content of article 11[35].

[65] The final wording will depend on the content of article 6[21] (States, Security Council, Prosecutor).

have jurisdiction over the crimes][66] as well as victims, may also submit observations to the Court.

3.[67] The admissibility of a case or the jurisdiction of the Court may be challenged only once by any person or State referred to in paragraph 2.

The challenge must take place prior to or at the commencement of the trial.

In exceptional circumstances, the Court may grant leave for a challenge to be brought more than once or at a time later than the commencement of the trial.

Challenges to the admissibility of a case, at the commencement of a trial, or subsequently with the leave of the Court as provided in the preceding subparagraph, may only be based on article 11[35], paragraph 1[2] (c).[68]

3 bis. A State referred to in paragraph 2 (b) of the present article shall make a challenge at the earliest opportunity.[69]

4. Prior to the confirmation of the indictment, challenges to the admissibility of a case or challenges to the jurisdiction of the Court, shall be referred to the Pre-Trial Chamber. After confirmation of the indictment, they shall be referred to the Trial Chamber.

Decisions with respect to jurisdiction or admissibility may be appealed to the Appeals Chamber.[70] [71]

[5. If the Court has decided that a case is inadmissible pursuant to article 11[35], the Prosecutor, may, at any time, submit a request for a review of the decision, on the grounds that conditions required under article 11[35] to render the case inadmissible no longer exist or that new facts arose.]

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[66] This provision would apply to the option where only States parties can challenge the jurisdiction of the Court or the admissibility of a case.

[67] It was suggested that if several States have jurisdiction over a case and one of those States has already challenged the jurisdiction of the Court, the remaining States should not bring additional challenges except on different grounds.

[68] The final wording of this subparagraph will depend on the content of article 11[35].

[69] The question arises as to what consequences, if any, should flow from the failure of a State to make a timely challenge.

[70] Subject to the final decision or the organization of the Court.

[71] The question concerning the suspension of the trial proceeding in case of appeal should be addressed in the Rules of Procedure.

Article 13[42]

Non bis in idem

N.B.

- This article as such was not considered by the Preparatory Committee in 1997.

- Consideration should be given to placing certain portions of this article in a separate article before article 12[36] (Challenges to the jurisdiction of the Court or the admissibility of a case).

ILC draft

1. No person shall be tried before any other court for acts constituting a crime of the kind referred to in article 5[20] for which that person has already been tried by the Court.

2. A person who has been tried by another court for acts constituting a crime of the kind referred to in article 5[20] may be tried under this Statute only if:

(a) the acts in question were characterized by that court as an ordinary crime and not as a crime which is within the jurisdiction of the Court; or

(b) the proceedings in the other court were not impartial or independent or were designed to shield the accused from international criminal responsibility or the case was not diligently prosecuted.

3. In considering the penalty to be imposed on a person convicted under this Statute, the Court shall take into account the extent to which a penalty imposed by another court on the same person for the same act has already been served.

N.B. Consideration should be given to whether paragraph 3 is already covered by article 70[BCE] (2) (Determination of the sentence).

Other proposals contained in A/51/22, vol. II[72]

1. [No person shall be tried before any other court for acts constituting a crime referred to in article 5[20] for which that person already has been tried by the Court.] [Once convicted or acquitted by a final judgement of the Court] for acts constituting a crime of the kind referred to in article 5[20] a person may no longer be accused on the basis of the same evidence, even for a different offence, either by the organs of the Court or by the judicial authorities of the States Parties, unless new evidence is made known [in which case the Prosecutor of the Court may institute new proceedings].

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[72] P. 202.

2. [No person shall be tried before any other court for acts constituting a crime referred to in article 5[20] for which that person already has been tried by the Court.] A person who has been tried by another court for acts constituting a crime of the kind referred to in article 5[20] may be tried under this Statute only if:

(a) the acts in question were characterized by that court as an ordinary crime and not as a crime which is within the jurisdiction of the Court; or

(b) the proceedings in the other court were not impartial or independent or were designed to shield the accused from international criminal responsibility or the case was not diligently prosecuted.

[2 bis. The court has no jurisdiction under this Statute when:

~~(a) The acts mentioned in the submission to the Court are still being investigated by a State and the investigation is not manifestly intended to relieve the person concerned of criminal responsibility;~~

~~(b) The acts mentioned in the submission to the Court have already been duly investigated by a State and the decision not to institute proceedings was taken by that State when it had knowledge of all the facts mentioned in the submission and the decision was not motivated by a manifest willingness to relieve the persons concerned of any criminal responsibility;~~

N.B. The above text seems to have been superseded by article 11[35] (Issues of admissibility).

(c) Any person(s) mentioned in the submission to the Court have already been acquitted or convicted by a final ruling in a State for the acts involved unless the decision failed to take account of all facts contained in the submission or the proceedings were conducted in the State concerned by evading the rule of international law for the manifest purpose of relieving the persons concerned of criminal responsibility.

3. In considering the penalty to be imposed on a person convicted under this Statute, the Court shall take into account the extent to which a penalty imposed by another court on the same person for the same act has already been served.

N.B. Consideration should be given to whether paragraph 3 is already covered by article 70[BCE] (2) (Determination of the sentence).

N.B. Article 13[42] was moved to this part because of its relationship to jurisdiction and admissibility.

Article 14[33]

Applicable law

N.B. This article was not considered by the Preparatory Committee in 1997.

ILC draft

The Court shall apply:

(a) this Statute;

(b) applicable treaties and the principles and rules of general international law; and

(c) to the extent applicable, any rule of national law.

Other proposals contained in A/51/22, vol. II[73]

Proposal 1

1. The Court shall apply this Statute.

2. When the Court cannot find the necessary provision to be applied, the Court may apply:

(a) The national law of the State where the crime was committed;

(b) If the crime was committed in the territories of more than one State, the national law of the State where the substantial part of the crime was committed;

(c) If the laws of the States mentioned in (a) and (b) do not exist, the national law of the State of nationality of the accused, or if the accused does not have any nationality, the national law of the State of permanent residence of the accused; or

(d) If the laws of the States mentioned in (a), (b) and (c) do not exist, the national law of the State which had custody of the accused, as far as these laws are consistent with the objectives and purposes of this Statute.

Proposal 2

1. The Court shall apply:

(a) The Statute, including annexes A and B [A/51/22, vol. II], rules adopted pursuant to article 43[19] and elements of crimes and principles of liability and defence elaborated pursuant to article 20 bis;

(b) Applicable treaties and the principles and rules of general international law; and

(c) Principles of law developed by the Court from national law.

[73] Pp.104-107.

2. In developing principles of law as referred to in paragraph 1(c), the Court shall [conduct and] take into account [a survey of] the national laws of States representing the major legal systems of the world, where those laws are not inconsistent with international law and internationally recognized norms and standards.

The Court shall only apply paragraph 1(c) to the extent that a matter is not covered by paragraphs 1 (a) or (b).

Proposal 3

The Court shall apply:

(a) Its Statute, including the annexes thereto;

(b) The other relevant rules of international law;

(c) General principles of criminal law identified by it and approved by States parties to the statute;

(d) Rules of national law, to the extent authorized by the Statute, and

(e) Its Rules of Procedure and Evidence.

Proposal 4

1. This Statute (and the rules promulgated thereunder) shall be the primary source of law for the Court.

2. To the extent not inconsistent with the above, the Court may apply principles and rules of law that are generally recognized in national legal systems as a subsidiary source of law.

3. To the extent not inconsistent with the above, the Court may apply specific rules of applicable national law, or applicable treaty provisions, where necessary to the determination of a specific question that is governed by such law or treaty, or where the application or interpretation of such specific law or treaty is in fact at issue in the case.

Proposal 5

The Court shall apply:

(a) In the first place, this Statute and the treaties to which it makes reference;

(b) If necessary, the principles and rules of general international law;

(c) Failing that, and provided that such action does not conflict with the provisions mentioned above, the internal law of the State in whose territory the crime has been committed and, on a subsidiary basis, the internal law of the State of which the accused is a national.

Proposal 6

The Court may apply principles and rules of law enunciated in its previous decisions.

Proposal 7

1. Subject to paragraphs 2 and 3, the judges may by absolute majority elaborate the elements of the crimes set out in article 5[20] and elaborate principles of liability and defence that are not otherwise set out in, and that are not inconsistent with, the elements and principles in the Statute or in annex B. In elaborating elements and principles, the Court shall not create any new offences or crimes.

2. The initial elements and principles elaborated by the Court shall be drafted by the judges within six months of the first elections for the Court, and submitted to a conference of States parties for approval. The judges may decide that an element or principle subsequently elaborated under paragraph 1 should also be submitted to a conference of States parties for approval.

3. In any case to which paragraph 2 does not apply, elements or principles elaborated under paragraph 1 shall be transmitted to States parties and may be confirmed by the Presidency unless, within six months after transmission, a majority of States parties have communicated in writing their objections.

4. An element or principle may provide for its provisional application in the period prior to its approval or confirmation. An element or principle not approved or confirmed shall lapse.

N.B. This proposal only partly covers the subject of the other proposals under article 14[33]. It has a clear relationship both with the definition of crimes in this part and the General principles of criminal law in part 3.

N.B.

- Article 14[33] has a bearing on many parts of the Statute which contain specific provisions on this question in particular contexts.

- As regards the placement of the article, either it could be retained here at the end of this part or be placed between the articles on jurisdiction and those on admissibility.

- See also the first footnote in paragraph 2 of article 25[L] (Grounds for excluding criminal responsibility).

PART 3. GENERAL PRINCIPLES OF CRIMINAL LAW

Article 15[A][74]

Nullum crimen sine lege

1. Provided that this Statute is applicable in accordance with article 6[21], 7[21 bis], 8[21 ter], 9[22] or 10[23] a person shall not be criminally responsible under this Statute:

(a) in the case of a prosecution with respect to a crime referred to in article 5[20] [(a) to (d)], unless the conduct in question constitutes a crime that is defined in this Statute;

(b) in the case of a prosecution with respect to a crime referred to in article [5[20] (e)], unless the treaty in question was applicable to the conduct of the person at the time that the conduct occurred.

[2. Conduct shall not be construed as criminal and sanctions shall not be applied under this Statute by a process of analogy.]

3. Paragraph 1 shall not affect the character of such conduct as being crimes under international law, apart from this Statute.

Article 16[A bis][75]

Non-retroactivity

1. Provided that this Statute is applicable in accordance with article 15[A], a person shall not be criminally responsible under this Statute for conduct committed prior to its entry into force.

[2. If the law as it appeared at the commission of the crime is amended prior to the final judgement in the case, the most lenient law shall be applied.][76]

~~Other proposals that may also relate to, inter alia, issues concerning trigger mechanism and other jurisdictional questions respectively, and which will be debated by the Preparatory Committee at a later session~~

~~[When a State becomes a party to this Statute after its entry into force, the Court has jurisdiction only in respect of acts committed by its nationals or on its territory or against its nationals after the deposit by that State of its~~

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[74] A/AC.249/1997/L.5, p. 19.

[75] Ibid., pp. 19-20.

[76] This provision raises issues relating to non-retroactivity, amendment of the Statute and penalties. Accordingly, further consideration of this issue is required.

~~instrument of ratification or accession. A non-party State may, however, by an express declaration deposited with the Registrar of the Court, agree that the Court has jurisdiction in respect of the acts that it specifies in the declaration.~~

~~The Court has no jurisdiction in respect of crimes for which, even if they have been committed after the entry into force of this Statute, the Security Council, acting under Chapter VII of the Charter of the United Nations, has decided before the entry into force of this Statute to establish an ad hoc international criminal tribunal. The Security Council may, however, decide otherwise.]~~

~~[The present Statute shall apply only to acts committed in the territory of a State Party to the present Statute or by the nationals of a State Party to the present Statute or against the nationals of a State Party to the present Statute.]~~

N.B. Other proposals under paragraph 2 could be deleted because the issues with which they dealt are covered under articles 7[21 bis] (Preconditions to the exercise of jurisdiction), 8[21 ter] (Temporal jurisdiction) and 9[22] (Acceptance of the jurisdiction of the Court).

Article 17[B.a to d][77]

Individual criminal responsibility

1. The Court shall have jurisdiction over natural persons pursuant to the present Statute.

2. A person who commits a crime under this Statute is individually responsible and liable for punishment.

[3. Criminal responsibility is individual and cannot go beyond the person and the person's possessions.][78]

4. The fact that the present Statute provides criminal responsibility for individuals does not affect the responsibility of States under international law.

[5. The Court shall also have jurisdiction over legal persons, with the exception of States, when the crimes committed were committed on behalf of such legal persons or by their agencies or representatives.

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[77] A/AC.249/1997/L.5, pp. 20-22.

[78] This proposal deals mainly with the limits of civil liability and should be further discussed in connection with penalties, forfeiture and compensation to victims of crimes.

6. The criminal responsibility of legal persons shall not exclude the criminal responsibility of natural persons who are perpetrators or accomplices in the same crimes.][79]

N.B. In the context of paragraphs 5 and 6, see also articles 69[47 bis] (Penalties applicable to legal persons) and 88[59 ter] (Enforcement of fines and forfeiture measures).

7. [Subject to the provisions of articles 19[C], 22[G] and 23[H],] a person is criminally responsible and liable for punishment for a crime defined [in article 5[20]] [in this Statute] if that person:

(a) commits such a crime, whether as an individual, jointly with another, or through another person regardless of whether that person is criminally responsible;

(b) orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

[(c) fails to prevent or repress the commission of such a crime in the circumstances set out in article 19[C];]

(d) [with [intent] [knowledge] to facilitate the commission of such a crime,] aids, abets or otherwise assists in the commission [or attempted commission] of that crime, including providing the means for its commission;[80]

(e) either:

(i) [intentionally] [participates in planning] [plans] to commit such a crime which in fact occurs or is attempted; or

[(ii) agrees with another person or persons that such a crime be committed and an overt act in furtherance of the agreement is committed by any

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[79] There is a deep divergence of views as to the advisability of including criminal responsibility of legal persons in the Statute. Many delegations are strongly opposed, whereas some strongly favour its inclusion. Others have an open mind. Some delegations hold the view that providing for only the civil or administrative responsibility/liability of legal persons could provide a middle ground. This avenue, however, has not been thoroughly discussed. Some delegations, who favour the inclusion of legal persons, hold the view that this expression should be extended to organizations lacking legal status.

[80] It was pointed out that the commentary to the ILC Draft Code of Crimes (A/51/10, p. 24, para. (12)) implicitly also includes aiding, abetting or assisting ex post facto. This presumption was questioned in the context of the ICC. If aiding, etc., ex post facto were deemed necessary to be criminalized, an explicit provision would be needed.

of these persons that manifests their intent [and such a crime in fact occurs or is attempted];[81]][82]

(f) [directly and publicly] incites the commission of [such a crime] [genocide] [which in fact occurs], [with the intent that such crime be committed];

(g)[83] [with the intent to commit such a crime,] attempts to commit that crime by taking action that commences its execution by means of a substantial step, but that crime does not occur because of circumstances independent of the person's intentions.[84]

N.B. This article should be re-examined as to the references to the mental element in view of article 23[H] (Mens rea (mental elements)).

Article 18[B.e][85]

Irrelevance of official position

1. This Statute shall be applied to all persons without any discrimination whatsoever: official capacity, either as Head of State or Government, or as a member of a Government or parliament, or as an elected representative, or as a government official, shall in no case exempt a person from his criminal responsibility under this Statute, nor shall it [per se] constitute a ground for reduction of the sentence.

2. Any immunities or special procedural rules attached to the official capacity of a person, whether under national or international law, may not be

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[81] In addition to the two types of conduct described in para. (e), there is a third type of criminal association that may be considered. One formulation of this third category would be to refer to the conduct of a person who "participates in an organization which aims at the realization of such a crime by engaging in an activity that furthers or promotes that realization".

[82] The inclusion of this subparagraph gave rise to divergent views.

[83] Questions pertaining to voluntary abandonment or repentance should be further discussed in connection with grounds for excluding criminal responsibility.

[84] A view was expressed that it would be preferable that issues connected with attempt be taken up in a separate article rather than in the framework of individual responsibility. In that view, the article on individual responsibility should only refer to the way in which the person takes part in the commission of a crime, regardless of whether it deals with a completed crime or an attempted crime.

[85] A/AC.249/1997/L.5, p. 22.

relied upon to prevent the Court from exercising its jurisdiction in relation to that person.[86]

Article 19[C][87]

Responsibility of [commanders] [superiors][88] for acts of [forces under their command] [subordinates][89]

[In addition to other forms of responsibility for crimes under this Statute, a [commander] [superior] is criminally responsible] [A [commander] [superior] is not relieved of responsibility][90] for crimes under this Statute committed by [forces] [subordinates] under his or her command [or authority] and effective control as a result of the [commander's] [superior's] failure to exercise properly this control where:

(a) the [commander] [superior] either knew, or [owing to the widespread commission of the offences] [owing to the circumstances at the time] should have known, that the [forces] [subordinates] were committing or intending to commit such crimes; and

(b) the [commander] [superior] failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission [or punish the perpetrators thereof].

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[86] Further discussion of paragraph 2 would be required in connection with ~~procedure as well as~~ international judicial cooperation.

N.B. The deleted text is no longer relevant in the light of subsequent discussions.

[87] A/AC.249/1997/L.5, p. 23.

[88] Most delegations were in favour of extending the principle of command responsibility to any superior.

[89] One delegation held the view that this principle should be dealt with in connection with the definitions of the crimes.

[90] The alternatives highlight the question whether command responsibility is a form of criminal responsibility in addition to others or whether it is a principle that commanders are not immune for the acts of their subordinates.

Article 20[E][91]

Age of responsibility

N.B. In the context of this article, see also article 68[A] (a) (Applicable penalties).

Proposal 1

1. A person under the age of [twelve, thirteen, fourteen, sixteen, eighteen] at the time of the commission of a crime [shall be deemed not to know the wrongfulness of his or her conduct and] shall not be criminally responsible under this Statute[, unless the Prosecutor proves that the person knew the wrongfulness of his or her conduct at that time].

[2. A person who is between the age of [sixteen] and [twenty-one] at the time of the [alleged] commission of a crime shall be evaluated [by the Court] as to his or her maturity to determine whether the person is responsible under this Statute.]

Proposal 2

[Persons aged 13 to 18 years at the time of the facts shall be criminally responsible but their prosecution, trial and sentence and the regime under which they serve their sentence may give rise to the application of special modalities specified in the Statute.][92]

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[91] A/AC.249/1997/L.5, pp. 23-24.

[92] Different views exist among States as to a specific age of responsibility.

It was observed that many international conventions (such as the International Covenant on Civil and Political Rights, the European Convention on Human Rights, the Inter-American Convention on Human Rights) prohibit the punishment of minors.

The question arising from the draft proposals was whether an absolute age of responsibility should be mandated or whether a presumptive age should be included with a means to rebut the presumption.

It was observed that a consistent approach (in terms of either an evaluation by the Court or proof by the Prosecutor) should be taken in paragraphs 1 and 2 of proposal 1 in respect of both of the age groups mentioned.

A question was raised as to what would be the criteria of the evaluation process, and should this be left for the Court to develop in supplementary rules or by jurisprudence?

Article 21[F][93]

Statute of limitations

Proposal 1

[1. The period of limitations shall be completed upon the lapse of xx years for the offence of ..., and yy years for the offence of ...

2. The period of limitations shall commence to run at the time when criminal conduct has ceased.

3. The period of limitations shall cease to run on the institution of the prosecution against the case concerned to this Court or to a national court of any State that has jurisdiction on such case. The period of limitations begins to run when the decision of the national court becomes final, where this Court has jurisdiction over the case concerned.]

Proposal 2

[There is no statute of limitations for those crimes within the [inherent] jurisdiction of the Court.]

Proposal 3

[There is no statute of limitations for those crimes within the [inherent] jurisdiction of the Court; but [for those crimes not within the Court's inherent jurisdiction] the Court may decline to exercise jurisdiction if, owing to the lapse of time, a person would be denied a fair trial.]

Proposal 4

[Crimes not subject to limitation

The crimes referred to in article 5[20] (a), (b) and (d) shall not be subject to limitation.

~~It was questioned whether the Statute should specify that mitigation of sentence should or could be appropriate for those minors who were found to be mature enough to be criminally responsible.~~

N.B. This paragraph of the footnote is redundant in the light of article 70[BCE] (Determination of the sentence).

It was observed that, in its article 1, the Convention on the Rights of the Child defines as a child every human being younger than eighteen years of age and that, in its article 37, it lays down a series of limitations as regards the applicable penalties, ruling out the death penalty and life imprisonment without parole.

[93] A/AC.249/1997/L.5, pp. 24-26.

Crimes subject to limitation

1. Proceedings before the Court in respect of the crimes referred to in article 5[20](c) shall be subject to a period of limitation of 10 full years from the date on which the crime was committed, provided that during this period no prosecution has been brought.

2. If a prosecution has been initiated during this period, either before the Court or in a State competent to bring a prosecution under its internal law, the proceedings before the Court shall not be subject to limitation until 10 full years have elapsed from the date of the most recent prosecution.]

Proposal 5

[1. The statute of limitations as established hereunder shall extinguish the criminal prosecution and the punishment.

2. The statute of limitations will be [ ] years and shall commence to run as follows:

(a) in case of instantaneous crime, from the moment of its perpetration;

(b) in case of attempt, from the moment the last act of execution was performed or the due conduct was omitted;

(c) in case of permanent crime, from the moment of the cessation of the criminal conduct.

3. The statute of limitations may be interrupted by the actions taken in the investigation of the crime and its perpetrators. If those actions were stopped, the statute of limitations will run again as of the day the last act of investigation was carried out.

4. The statute of limitations for definitive sanctions will run as of the moment the condemned person escaped and will be interrupted with its detention.]

N.B. The proposals under this article have not been consolidated.

Article 22[G][94]

Actus reus (act and/or omission)

1. Conduct for which a person may be criminally responsible and liable for punishment as a crime can constitute either an act or an omission, or a combination thereof.

2. Unless otherwise provided and for the purposes of paragraph 1, a person may be criminally responsible and liable for punishment for an omission where the

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[94] A/AC.249/1997/L.5, pp. 26-27.

person [could] [has the ability], [without unreasonable risk of danger to him/herself or others,] but intentionally [with the intention to facilitate a crime] or knowingly fails to avoid the result of an offence where:

(a) the omission is specified in the definition of the crime under this Statute; or

(b) in the circumstances, [the result of the omission corresponds to the result of a crime committed by means of an act] [the degree of unlawfulness realized by such omission corresponds to the degree of unlawfulness to be realized by the commission of such act], and the person is [either] under a pre-existing [legal] obligation under this Statute[95] to avoid the result of such crime [or creates a particular risk or danger that subsequently leads to the commission of such crime].[96]

[3. A person is only criminally responsible under this Statute for committing a crime if the harm required for the commission of the crime is caused by and [accountable] [attributable] to his or her act or omission.][97]

Article 23[H][98]

Mens rea (mental elements) ~~of crime~~

1. Unless otherwise provided, a person is only criminally responsible and liable for punishment for a crime under this Statute if the physical elements are committed with intent and knowledge.

2. For the purposes of this Statute and unless otherwise provided, a person has intent where:

(a) in relation to conduct, that person means to engage in the act or omission;

(b) in relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

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[95] Some delegations questioned whether the source of this obligation is wider than the Statute.

[96] Some delegations had concerns about including this clause which referred to the creation of a risk. Other delegations thought that, in the context of the offences of the Statute, breach of an obligation under the Statute to avoid the result of a crime was sufficient.

[97] Some delegations thought that a provision on causation was not necessary.

[98] A/AC.249/1997/L.5, pp. 27-28.

3. For the purposes of this Statute and unless otherwise provided, "know", "knowingly" or "knowledge" means to be aware that a circumstance exists or a consequence will occur.

[4.[99] [100] For the purposes of this Statute and unless otherwise provided, where this Statute provides that a crime may be committed recklessly, a person is reckless with respect to a circumstance or a consequence if:

(a) the person is aware of a risk that the circumstance exists or that the consequence will occur;

(b) the person is aware that the risk is highly unreasonable to take;

[and]

[(c) the person is indifferent to the possibility that the circumstance exists or that the consequence will occur.]]

N.B. The inclusion of the notion of recklessness should be re-examined in view of the definition of crimes.

Article 24[K][101] [102]

Mistake of fact[103] or of law

Option 1

Unavoidable mistake of fact or of law shall be a ground for excluding criminal responsibility provided that the mistake is not inconsistent with the nature of the alleged crime. Avoidable mistake of fact or of law may be considered in mitigation of punishment.

Option 2

1. A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime [charged provided that said mistake is not inconsistent with the nature of the crime or its

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[99] Further discussion is needed on this paragraph.

[100] A view was expressed to the effect that there was no reason for rejecting the concept of commission of an offence also through negligence, in which case the offender shall be liable only when so prescribed by the Statute.

[101] A/AC.249/1997/L.5, p. 28.

[102] There were widely divergent views on this article.

[103] Some delegations were of the view that mistake of fact was not necessary because it was covered by mens rea.

elements] [, and provided that the circumstances he reasonably believed to be true would have been lawful].

2. Mistake of law may not be cited as a ground for excluding criminal responsibility [, except where specifically provided for in this Statute].[104]

Article 25[L][105]

Grounds for excluding criminal responsibility

1. In addition to other grounds for excluding criminal responsibility permitted by this Statute, a person is not criminally responsible if at the time of that person's conduct:[106]

(a) the person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law;

[(b) the person is in a state of [involuntary] intoxication [by alcohol, drugs or other means] that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law; [provided, however, that if the person has voluntarily become intoxicated [[with the pre-existing intent to commit the crime] [or knowing that the circumstances would arise that led him or her to commit the crime and that those circumstances could have that effect]],[107] the person shall remain criminally responsible;]

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[104] Some delegations felt that paragraph 2 of option 2 still left some ambiguity, and an alternative approach could read as follows:

"Mistake of law as to whether a particular type of conduct is a crime under this Statute, or whether a crime is within the jurisdiction of the Court, is not a ground for excluding criminal responsibility. However, a [reasonable] mistake of law may be a ground for excluding criminal responsibility if it negates the mental element required by such crime."

[105] A/AC.249/1997/L.9/Rev.1, pp. 16-18.

[106] The link between the opening clause of paragraph 1 and paragraph 2 may need to be further considered.

[107] There are two approaches to the question of voluntary intoxication: If it is decided that voluntary intoxication should in no case be an acceptable ground for excluding criminal responsibility, the text within brackets "[with the pre-existing intent to commit the crime] [or knowing that the circumstances would arise that led him or her to commit the crime and that those circumstances could have that effect]" would have to be deleted. In that case, however, provision should be made for mitigation of punishment with regard to persons who were not able to form a specific intent, where required, towards the crime

(c) the person [, provided that he or she did not put himself or herself voluntarily into a position causing the situation to which that ground for excluding criminal responsibility would apply,] acts [swiftly and] reasonably [, or in the reasonable belief that force is necessary,] to defend himself or herself or another person [or property] against an [imminent ...[108] use of force] [immediate ...[109] threat of force] [impending ...[110] use of force] and [[unlawful] [and] [unjustified]] use of force in a [not excessive] manner[.] [[not disproportionate] [reasonably proportionate] to the degree of danger to the person [or liberty] [or property] protected];

(d) [the person reasonably believes that][111] there is a threat of [imminent] death or serious bodily harm against that person or another person [or against his or her liberty] [or property or property interests] and the person acts reasonably to avoid this threat, provided that the person's action[112] [causes] [was not intended to cause] [n]either death [n]or a greater harm than the one sought to be avoided;[113] [however, if the person has [knowingly] [recklessly] exposed him or herself to a situation which was likely to lead to the threat, the person shall remain responsible];

(e) [the person reasonably believes that there are][114] [there are] [the person necessarily acts in response to] circumstances beyond that person's control which constitute a [threat of [imminent] death or serious bodily harm]

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committed due to their intoxication. If this text were to be retained, the ground for excluding criminal responsibility would apply in all cases of voluntary intoxication except for those in which the person became intoxicated in order to commit the crime in an intoxicated condition (actio libera in causa). This would probably lead to a great number of war crimes and crimes against humanity going unpunished.

[108] Dots inserted so as not to repeat "[[unlawful] [and] [unjustified]]" in all three alternatives.

[109] Ibid.

[110] Ibid.

[111] This should be considered together with article 24[K].

[112] A proposal was made to replace the rest of the first sentence by "is under the circumstances not reasonably more excessive than the threat or perceived threat".

[113] A proposal was made to replace "provided that the person's action [causes] [was not intended to cause] [n]either death [n]or a greater harm than the one sought to be avoided" with "employing means which are not disproportionate to the risk faced".

[114] This should be considered together with article 24[K].

[danger] to that person or another person [or property or property rights][115] and the person acts reasonably to avoid the [threat] [danger], [provided that the person intended to prevent a greater harm [and did not intend to cause] [and did not cause] death][116] and provided that there exists no other way to avoid such threat].

2. The Court may[117] determine the applicability of the grounds for exclusion of criminal responsibility[118] [listed in paragraph 1] [permitted by this Statute] [to the case before it].[119]

Article 26 [M][120]

Superior orders and prescription of law

1. The fact that a person's conduct was pursuant to an order of a Government or of a superior [whether military or civilian] shall [not] relieve the person of criminal responsibility [[if] [unless] the order [was known to be unlawful or] appeared to be manifestly unlawful].[121]

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[115] It was suggested that a mere reference to the law of necessity would suffice in place of the first part of the sentence.

[116] This applies more to a military situation.

[117] There was support, in principle, for two proposals regarding application of international law and non-discrimination in the interpretation of general principles of criminal law. The first proposal is to insert, after the word "may" the phrase ", in accordance with international law,". The second proposal is to add the following provision: "The application and interpretation of the general sources of law must be consistent with international human rights standards and the progressive development thereof, which encompasses the prohibition on adverse discrimination of any kind, including discrimination based on gender." These proposals relate to both article 14 [33] and part 3. In order to avoid duplication, discussion could take place in the context of those provisions.

[118] The issue of the extent to which the facts underlying these grounds, for excluding criminal responsibility, if not sufficient to exclude criminal responsibility, should instead be considered in mitigation of punishment will be dealt with in part 7.

[119] The link between the opening clause of paragraph 1 and paragraph 2 may need to be reconsidered.

[120] A/AC.249/1997/L.9/Rev.1, pp. 18-19.

[121] An unlawful or manifestly unlawful order must be understood as an order in conflict with the rules of international law applicable in armed conflict.

[The perpetrator of or an accomplice in a crime of genocide [or a crime against humanity] [or a ...] shall not be exempted from criminal responsibility on the sole ground that the person's conduct was pursuant to an order of a Government or a superior, or pursuant to national legislation or regulations.][122] [123]

[2. Persons who have carried out acts ordered by the Security Council or in accordance with a mandate issued by it shall not be criminally responsible before the Court.][124]

[Article 27[N]][125] [126]

[Possible grounds for excluding criminal responsibility specifically referring to war crimes]

...

Article 28[O][127]

Other grounds for excluding criminal responsibility

1. At trial the Court may consider a ground for excluding criminal responsibility not specifically enumerated in this ~~chapter~~ part if the ground:

(a) is recognized [in general principles of criminal law common to civilized nations] [in the State with the most significant contacts to the crime] with respect to the type of conduct charged; and

(b) deals with a principle clearly beyond the scope of the grounds for excluding criminal responsibility enumerated in this ~~chapter~~ part and is not otherwise inconsistent with those or any other provisions of the Statute.

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[122] This subparagraph should be considered together with article 25[L], paragraph 2.

[123] For the question of mitigating circumstances, see part 7.

[124] There were widespread doubts about the contents and the placement of this paragraph.

[125] A/AC.249/1997/L.9/Rev.1, p. 19.

[126] It was questioned whether such grounds as military necessity could be dealt with in connection with the definition of war crimes.

[127] A/AC.249/1997/L.9/Rev.1, p. 19.

2. The procedure for asserting such a ground for excluding criminal responsibility shall be set forth in the Rules of the Court.[128]

~~Article P~~

~~Presumption of innocence~~

~~Everyone shall be presumed innocent until proved guilty in accordance with law. The onus is on the Prosecutor to establish the guilt of the accused beyond a reasonable doubt.~~

N.B. Article P is proposed for deletion because it is reproduced in article 59[40] (Presumption of innocence).

[128] This article needs to be further considered together with article 25[L], paragraph 2, and article 14[33].

PART 4. COMPOSITION AND ADMINISTRATION OF THE COURT

N.B.

- The articles in part 4 were not considered by the Preparatory Committee in 1997. Except for article 44[31] (ILC draft), the articles in this part are abbreviated compilations of proposals contained in A/51/22, vol. II.

- During the discussion of this part at the March/April session of the Preparatory Committee, consideration should be given to whether provisions of a more detailed nature could be placed more appropriately in the Rules.

Article 29[5][129]

Organs of the Court

The Court consists of the following organs:

(a) [a Presidency,][an Administrative Council] as provided in article 32[8];

[(aa) Pre-Trial Chambers, as provided for in article ...][an Investigative Judge, as provided for in article 47[26](2)(c)];

(b) an Appeals Chamber, Trial Chambers [and a Remand Chamber] and other Chambers, as provided for in article 33[9];

(c) a [Procuracy][Prosecutor's Office], as provided for in article 36[12]; and

(d) a Registry, as provided for in article 37[13].

[(e) a General Assembly of Judges, consisting of all the judges of the Court.]

[(f) an Assembly of States Parties, as provided for in article ...]

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[129] A/AC.249/1998/WG.7/CRP.1, p. 1.

N.B.

- This article could also be placed in part 1.

- The use of the terms "Procuracy/Prosecutor" should be harmonized throughout the text of the Statute.

- With respect to the use of the term "Court", consideration may be given to the inclusion in this article of the following provision:

In this Statute, unless a specific organ of the Court is referred to, the Court's powers shall be exercised and its obligations shall be discharged by such organs as may be prescribed by ...

Article 30[6][130]

Qualification and election of judges

1. The judges of the Court shall be persons of [high] [the highest] moral character, [independence,] [impartiality and integrity] who [possess [all] the qualifications required [in their respective countries] for [appointment to the highest judicial offices]] [are highly competent jurists].

[The judges shall have, in addition] [In the composition of the court and its Chamber, due account shall be taken of the experience of the judges in]:

(a) [at least five years'] [great] [criminal law] [criminal trial] experience [as a [judge] [member of the judiciary], Prosecutor or [defending attorney] [advocate]]; [or] [and/or] [and, where possible]

(b) [recognized competence] in [relevant] international [criminal] law [including international humanitarian law and human rights law].

[They shall also possess an excellent knowledge of and be fluent in at least one of the working languages referred to in article ...]

2. Option 1

Each [State party] [national group] may nominate for election not more than [two] [three] persons, [of different nationality,] [who possess the qualification[s] referred to in paragraph 1 [(a) or that referred to in paragraph 1 (b)],] and who are willing to serve as may be required on the Court.

Option 2

(a) When an election is required, the Nominating Committee shall develop a list of candidates, equal in number to the number of positions to be

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[130] A/AC.249/1998/WG.7/CRP.1, pp. 2-4.

filled, taking into account such views as may be submitted to it by the [Presidency] [Administrative Council], the Procuracy and States Parties and such other sources as the Committee may consult. [In addition to the mandatory requirements set forth in this article, the Committee shall consider as desirable criteria the degree of excellence in meeting the mandatory requirements, technical ability in professional skills and expertise in criminal law.]

(b) The Nominating Committee shall be composed of the [Secretary-General of the United Nations] [General Assembly of States Parties] [Chairmen of the Regional Groups] and shall consist of two members from each Regional Group, selected from among nominations by States Parties.

(c) Once the Nominating Committee is established, the Registrar shall provide the Committee, upon request, with any necessary facilities and administrative and staff support.

3. [12] [18] [24] [?][131] [The] judges [of the Court] shall be elected by [an absolute majority vote] [a two-thirds majority vote] [[the General Assembly of] the States Parties] [the General Assembly of the United Nations] [the General Assembly and the Security Council from a list of persons nominated by national groups appointed for the purpose by their Governments] [by secret ballot].

[In the event that a sufficient number of judges is not elected, the Nominating Committee shall provide a further list of candidates and there shall be another election.]

[Election may be by diplomatic note, with the results to be compiled and announced by the Depositary or, once the Court is established, the Registrar.]

[Ten judges shall first be elected, from among the persons nominated as having the qualification referred to in paragraph 1 (a). Eight judges shall then be elected, from among the persons nominated as having the qualification referred to in paragraph 1 (b).] [At least two thirds of the candidates should have experience in criminal proceedings.]

4. No two judges may be nationals of the same State. [The term of office shall end in all cases when the judge reaches 75 years of age.] [A judge may not be over the age of [61] [66] [65] [?] at the time of nomination] [Judges shall retire at the age of [70] [75].]

5. [States Parties] [The Nominating Committee] [should bear in mind] [shall endeavour] [shall take as a basis] in the [election] [and/or] [appointment] of the judges that the representation of the principal legal systems of the world [and the representation of the main forms of civilization] [should be] [is] [are] assured and [should aim for] [shall be on the basis of] [[overall balanced] [representation of geographic regions] [equitable geographic

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[131] It was suggested that the number of judges should be made flexible, depending on the volume of the work of the Court. A change in the number of judges should be possible without the need to amend the Statute.

distribution] [and cultures] and representation of women as well as men] [gender balance] [gender diversity].

6. Judges hold office for a term of [nine years and [are eligible for re-election] [, subject to paragraph 7 and article 31[7] (2), are not eligible for re-election] [[five] [six] years and may be re-elected [only once]].

A judge shall, however, continue in office in order to complete any case the hearing of which has commenced [even beyond the limit fixed by this article] [on the understanding that the matter be concluded within five years].

7. At the first election, [five] [six] [eight] [?] judges chosen by lot shall serve for a term of [three] [two] years and are eligible for re-election; [five] [six] [eight] [?] judges chosen by lot shall serve for a term of [six] [four] years; and the remainder shall serve for a term of [nine] [six] years. [In the event that the number of judges is increased at any stage, the terms of the additional judges shall be similarly staggered.][132]

[8. Judges nominated as having the qualification referred to in paragraph 1 (a) or 1 (b), as the case may be, shall be replaced by persons nominated as having the same qualification.]

Article 31[7][133]

Judicial vacancies

1. In the event of a vacancy, a replacement judge shall be elected in accordance with article 30[6].

2. A judge elected to fill a vacancy shall serve for the remainder of the predecessor's term, and if that period is less than [three] [five] years is eligible for re-election for a further term.

Article 32[8][134]

The [Presidency] [Administrative Council]

[0. The college of judges of the Court shall consist of:

(a) a [President] [Chief Judge];

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[132] This allows for a decision to increase the number of judges, but the means by which this decision is made depends on overall administrative arrangements and will be addressed elsewhere.

[133] A/AC.249/1998/WG.7/CRP.1, p. 5.

[134] A/AC.249/1998/WG.7/CRP.1, pp. 6-7.

(b) six [Vice-Presidents][Deputy Chief Judges], including a First [Vice-President][Deputy Chief Judge] and a Second [Vice-President][Deputy Chief Judge];

(c) seventeen judge counsellors.]

[The General Assembly of Judges of the Court shall be convened when one of the posts referred to in paragraph 0 (a) and (b) of this article falls vacant.]

1. The [President][Chief Judge], the First and Second [Vice-Presidents][Deputy Chief Judges] [and [two][four] alternate [Vice-Presidents][Deputy Chief Judges]] shall be elected by an absolute majority [of the judges][composing the Court] [at a General Assembly of Judges following their first election].

[The [Vice-Presidents][Deputy Chief Judges] and Alternates shall be chosen so as to represent both the appellate and trial judges.]

They shall serve for a term of three years or until the end of their term of office as judges, whichever is earlier. [They shall be eligible for re-election once.]

2. The First [or Second] [Vice-President][Deputy Chief Judge] [,as the case may be,] [may][shall] act in place of the [President][Chief Judge] in the event that the [President][Chief Judge] is unavailable or disqualified. [The Second [Vice-President][Deputy Chief Judge] shall act in place of the [President][Chief Judge] in the event that both the [President][Chief Judge] and the First [Vice-President][Deputy Chief Judge] are unavailable or disqualified. [The [President][Chief Judge] may appoint][an/An] alternate [Vice-President][Deputy Chief Judge] [who] may act in place of either [Vice-President][Deputy Chief Judge] as required.

3. The [President and the [First and Second] Vice-Presidents] [Chief and Deputy Chief Judges] shall constitute the [Presidency][Administrative Council], which shall be responsible for:

(a) the due administration of the Court [including the supervision and direction of the Registrar and staff of the Registry and the Court. The [Presidency][Administrative Council] shall consult with the Prosecutor and include the Prosecutor or Deputy in their meetings on all matters of mutual concern including, for example, the functioning of the Registry and security arrangements for defendants, witnesses and the Court][; and

(b) the other functions conferred on it by this Statute].

[4. Unless otherwise indicated, pre-trial and other procedural functions conferred on the Court under this Statute may be exercised by the [Presidency][Administrative Council] in any case where a Chamber of the Court is not seized of the matter.]

[4 bis. Decisions of the [Presidency][Administrative Council] shall be taken by [consensus][majority vote] of the members. [The [President][Chief Judge] shall have a casting vote in the event of a tie.]]

[5. The [Presidency] [Administrative Council] may, in accordance with the Rules, delegate to one or more judges the exercise of a power vested in it under articles 47[26] (3), 51[27] (5), 52[28], 53[29] or 54[30] (3) in relation to a case, during the period before a Trial Chamber is established for that case.]

Article 33[9][135]

Chambers

1. [As soon as possible after each election of judges to the Court,] [The [Presidency] [Administrative Council] shall in accordance with the Rules, constitute an Appeals Chamber] [and a Pre-Trial Chamber]. [An Appeals Chamber shall [be constituted of] [consist of] [the [President] [Chief Judge] and [six] [four] [two] other judges] [seven judges], [of whom [at least] three shall be judges elected from among the persons nominated as having the qualification referred to in article 30[6] (1) (b)] [and of whom [at least] three shall be judges elected from among the persons nominated as having the qualification referred to in article 30[6] (1) (a)] [to be elected by an absolute majority of the judges of the Court].

[The [President] [Chief Judge] shall preside over the Appeals Chamber.]

[The Appeals Chamber shall consist of six judge counsellors and either the First [Vice-President] [Deputy Chief Judge] or Second [Vice-President] [Deputy Chief Judge], who shall preside over it.]

[2. The [Indictment Chamber and the] Appeals Chamber shall be constituted for a term of three years. Members of the [Indictment Chamber and the] Appeals Chamber shall, however, continue to sit on the Chamber in order to complete any case the hearing of which has commenced.]

[Judges of the Indictment Chamber shall not serve in the Trial Chambers or in the Appeals Chamber at the same time.] [Judges who have served in the Appeals Chamber shall not serve in any other Chamber and judges who have served in a Trial Chamber shall not serve in the Appeals Chamber.] [Judges shall serve only once in any of the Chambers established by the Court.]

[(a) No member of the [Presidency] [Administrative Council] who has participated in a decision by the [Presidency] [Administrative Council] under articles 47[26](3), 51[27](5), 52[28], 53[29] or 54[30](3) of the Statute concerning the case being tried or under appeal may sit as a member of the Trial or Appeals Chamber in that case. No judge who has made a decision under articles 47[26](3), 51[27](5), 52[28], 53[29] or 54[30](3) of the Statute concerning the case being tried or under appeal pursuant to a delegation from the [Presidency] [Administrative Council] under article 32[8](5) of the Statute may sit as a member of the Trial or Appeals Chamber in that case.

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[135] A/AC.249/1998/WG.7/CRP.1, pp. 8-10.

(b) A member of the [Presidency][Administrative Council] who participated in the confirmation of the indictment against a suspect under article 51[27](2) of the Statute may not subsequently sit as a member of the Trial Chamber for the trial of that accused or as a member of the Appeals Chamber hearing an appeal in relation to that trial.

(c) If a judge is disqualified from continuing to sit in a part-heard trial and thereby deprives the Trial Chamber of its required quorum under article 65[45](1) of the Statute, he or she shall be replaced immediately by an alternate judge if the Trial Chamber has from the start of the trial comprised more than the required number of judges. Otherwise, the [Presidency] [Administrative Council] shall order a retrial.]

N.B. The issues raised in the second indented paragraph and subparagraphs (a) to (c) seem to deal with the disqualification of judges and may be considered in the context of article 35[11] (Excusing and disqualification of judges).

[3. Judges may be renewed as members of the Appeals Chamber for a second or subsequent term.]

4. Judges not members of the Appeals Chamber shall be available to serve on Trial Chambers and [other chambers][Pre-Trial Chambers][the Indictment Chamber] as required by this Statute, and to act as substitute members of the Appeals Chamber in the event that a member of that Chamber is unavailable or disqualified.

5. The [Presidency][Administrative Council] shall nominate [on a rotational basis [and for a fixed period of time] as far as possible and] in accordance with the Rules [and for a period of three years] [five][three] such judges to be members of the [Trial Chamber][two Trial Chambers][Pre-Trial Chamber][Indictment Chamber] for a given case. [A [Trial Chamber][Pre-Trial Chamber] shall include at least [three][two] judges elected from among the persons nominated as having the qualification referred to in article 30[6] (1) (a).]

[A Pre-Trial Chamber shall be responsible in the given case for such functions as prescribed in [articles 47[26](3) and (5), 51[27](2) to (4) and (5)(b), 52[28](1) to (3), 54[30](3), and any other functions concerning the pre-trial process.]

[The Trial Chamber shall consist of four judge counsellors and a [Vice-President][Deputy Chief Judge], who shall preside over it.]

[The members of the Trial Chambers shall continue to sit in order to complete any case the hearing of which has commenced.]

6. [The Rules may provide for alternate judges to be nominated [to attend a trial and] to act as members of [the Pre-Trial Chamber and] the Trial Chamber [or Indictment Chambers and the Appeals Chamber] in the event that a judge dies or becomes unavailable during the course of the trial.]

[If a judge sitting as a member of the Trial Chamber is unable to continue sitting in a part-heard trial owing to illness or other incapacity, the Presiding Judge may adjourn the proceedings if the cause of that inability seems likely to be of short duration. Otherwise, or if the cause of the inability is still present ten days after the adjournment, the Presiding Judge shall report to the [Presidency] [Administrative Council], which shall order a retrial. If the Trial Chamber has comprised more than the required number of judges from the start of the trial, the judge in question shall be replaced immediately by an alternate judge. This rule shall also apply to cases of death, loss of office or resignation of a judge from the Trial Chamber.]

[6. (a) The [Presidency] [Administrative Council] shall nominate in accordance with the Rules five such judges who are not members of the Pre-Trial Chamber for a given case to be members of the Trial Chamber for the same case. A Trial Chamber shall include at least three judges elected from among the persons nominated as having the qualification referred to in article 30[6](1)(a).]

[7. No judge who is a national of a complainant State or of a State of which the accused is a national shall be a member of a Chamber dealing with the case.]

N.B. This paragraph deals with the disqualification of judges and may be considered in the context of article 35[11] (Excusing and disqualification of judges).

[8. The Pre-Trial Chambers shall perform pre-trial functions, in accordance with Part 5[4] of this Statute.

8. (a) A Pre-Trial Chamber shall be established for each case by the [President] [Chief Judge] of the Court. It shall consist of two [Vice-Presidents] [Deputy Chief Judges] and either the First [Vice-President] [Deputy Chief Judge] or Second [Vice-President] [Deputy Chief Judge], who shall preside over it.]

[9. The Remand Chamber shall consist of four judge counsellors and either the First [Vice-President] [Deputy Chief Judge] or Second [Vice-President] [Deputy Chief Judge], who shall preside over it.]

[10. All members of the Chambers referred to in paragraph 1 of this article shall be chosen by lot. Judges drawn by lot may be excluded as a result of incompatibilities under article ... When the membership of a Chamber drawn by lot encounters difficulties owing to incompatibilities under article ..., the First and the Second [Vice-President] [Deputy Chief Judge] may be replaced by a [Vice-President] [Deputy Chief Judge], and a [Vice-President] [Deputy Chief Judge] by the most senior judge counsellor in the Court or, failing such a judge, the oldest.

10a. The [President] [Chief Judge] of the Court may, if he so wishes, preside over one of the chambers referred to in paragraph 1 of this article, subject to the provisions of article 37[13].

10b. For the membership of each of the Chambers referred to in article ..., the [President] [Chief Judge] of the Court may arrange for as many alternate judge

counsellors as he deems necessary to be chosen by lot. They attend hearings of the Chamber for which they have been designated, but do not participate in the deliberations. They are not, in that event, subject to the incompatibilities referred to in article ...

10c. In the course of a hearing, an alternate judge counsellor may be required to replace a member of the Chamber to which he has been designated when that member is temporarily unable to perform his duties, either for medical reasons or for one of the reasons set out in articles ... and ... The judge shall be chosen by lot from among the alternate judge counsellors designated for that Chamber. Incompatibilities under article ... shall apply to alternate judge counsellors required to sit under the conditions referred to in the preceding paragraph.]

[11. For the purposes of ruling on a case, the following functions may not be combined:

...

(b) serving as a member of the Trial Chamber and as a member of the Appeals Chamber.]

N.B. Paragraph 11 deals with disqualification of judges and may be considered in the context of article 35[11] (Excusing and disqualification of judges).

N.B. In the light of discussions on article 51[27] (Commencement of prosecution), the confirmation of the indictment would appear to be vested in either the Presidency or the Pre-Trial Chamber. Consideration should therefore be given to whether references to the "Indictment Chamber" should be retained.

Article 34[10][136]

Independence of the judges

1. In performing their functions, the judges shall be independent.

2. Judges shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence. In particular they shall not while holding the office of judge be a member of the legislative or executive branches of the Government of a State, or of a body responsible for the investigation or prosecution of crimes.

[Judges should be prohibited from exercising any political or administrative function or engaging in any other occupation of a professional nature.]

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[136] A/AC.249/1998/WG.7/CRP.1, p. 11.

[2. (a) Judges who are required to serve permanently on the Court, pursuant to article ..., may not engage in any other employment or hold any other office.]

3. Any question as to the application of paragraph 2 shall be decided by [the [Presidency] [Administrative Council]] [an absolute majority of the judges of the Court].

4. [On the recommendation of the [Presidency] [Administrative Council],] [When the [Presidency] [Administrative Council] considers that the Court's caseload requires the permanent presence of all the judges of the Court, it shall so inform], the [General Assembly of] the States parties [which] may [by a two-thirds majority] decide that [the workload of the Court requires that] the judges should serve on a full-time basis [for a period determined by the General Assembly or until further notice]. In that case:

(a) existing judges who elect to serve on a full-time basis shall not hold any other [full-time] office or employment; and

(b) judges subsequently elected shall not hold any other [full-time] office or employment.

Article 35[11][137]

Excusing and disqualification of judges

1. The [Presidency] [Administrative Council] [at the request of] [with the agreement of] a judge may excuse that judge from the exercise of a function under this Statute.

2. [Judges shall not participate in any case [in which they have previously been involved in any capacity] [in the event of one of the incompatibilities under article ...] or in which their impartiality might reasonably be doubted on any ground, including an actual, apparent or potential conflict of interest].

[In the following cases a judge shall be excluded from the exercise of his functions under this Statute:

(a) if he himself is the injured party;

(b) if he is or was a relative of the accused or the injured party;

(c) if he is a national of a complainant State or of a State of which the accused is a national;

(d) if he is the legal representative, supervisor of the guardian or curator of the accused or the injured party;

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[137] A/AC.249/1998/WG.7/CRP.1, pp. 12-13.

(e) if he has acted as a witness or an expert witness in the case involving the accused or the injured party;

(f) if he has acted as the representative, counsel or assistant of the accused in the case involving that accused;

(g) if he has exercised the functions of a public prosecutor or a judicial officer in the case involving the accused;

(h) if he has previously exercised the functions of a judge in the case involving the accused at the national level; or

(i) if he has participated in the decision mentioned in article 32[8] or 56[37] (4), in the decision by the Court below, in the original judgment of the case which has been sent back in accordance with the provisions of article 75[50] or in the investigations which form the basis of such decisions.]

3. The [[Presidency][Administrative Council],] Prosecutor or the accused may request the disqualification of a judge under paragraph 2. [Any request for the disqualification of a judge should include detailed reasons for the request.]

4. Any question as to the disqualification of a judge shall be decided by [an absolute majority of the members of the Chamber concerned][the Appeals Chamber]. The challenged judge shall not take part in the decision [if he forms part of that Chamber; he shall then be replaced by another judge chosen by lot].

[5. For the purposes of ruling on a case, the following functions may not be combined:

(a) serving as a member of the Pre-Trial Chamber appointed for a case under article 34[10] and as a member of one of the chambers hearing the same case;

(b) serving as a member of the Trial Chamber and as a member of the Appeals Chamber.]

[6. Procedures of the trial subsequent to the change of the judges in accordance with this article shall be prescribed by the rules.]

N.B. See also article 33[9] (2), (7) and (11) (Chambers).

Article 36[12][138]

The Procuracy

1. The Procuracy is an independent organ of the Court responsible [under this Statute] [for the investigation of complaints brought in accordance with this Statute and for the conduct of prosecutions][for receiving complaints addressed

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[138] A/AC.249/1998/WG.7/CRP.1, pp. 14-16.

to the Court, for examining them and for conducting investigations and prosecutions before the Court]. A member of the Procuracy shall not seek or act on instructions from any external source.

2. The Procuracy shall be headed by the Prosecutor, assisted by [one or more][two] Deputy Prosecutors, who [may act in place of the Prosecutor in the event that the Prosecutor is unavailable][are entitled to carry out any of the acts required of the Prosecutor under this Statute]. [The Procuracy is an indivisible body.] The Prosecutor and the Deputy Prosecutors shall be of different nationalities. The Prosecutor may appoint such other qualified staff as may be required.

3. The Prosecutor and Deputy Prosecutors shall be persons of high moral character, [impartiality and integrity in] and have [high][the highest level of] competence and [practical] experience [in the investigation and] in the prosecution of criminal cases. [They shall, furthermore, have an excellent knowledge of and be fluent in at least one of the working languages referred to in article 45[25].] They [shall][should] be elected by secret ballot by an absolute majority of the [States Parties] [States Parties, from among candidates nominated by [the members of the Court]][members of the Court, from among candidates nominated by the States Parties]. Unless a shorter term is otherwise decided on at the time of their election, they shall hold office for a term of [five][seven][nine] years and are [not] eligible for re-election.

4. The States Parties may [elect the Prosecutor and Deputy Prosecutors][nominate two persons] on the basis that they are willing to serve as [may be] required [in the Procuracy of the Court].

[4 bis. (a) The Prosecutor and Deputy Prosecutors shall be elected by the General Assembly of the States Parties. The election of the Prosecutor shall be held first, followed by that of the two Deputy Prosecutors. No two members of the Procuracy of the Court may be of the same nationality.

(b) The Prosecutor and Deputy Prosecutors shall hold office for nine years. The term shall end in all cases when the person reaches 70 years of age. They shall not be eligible for re-election.]

[4 ter. The Prosecutor and Deputy Prosecutors shall not engage in any activity which is likely to interfere with their prosecutorial functions or to affect confidence in their independence. In particular they shall not, while holding office, be a member of the legislative or executive branches of the Government of a State [, or of a body responsible for the investigation or prosecution of crimes].]

5. [The Prosecutor and Deputy Prosecutors shall not act in relation to a complaint [initiated by their State of nationality or] involving a person of their own nationality [or in any case in which they have previously been involved in any capacity]]. [They shall not participate in any case in which they are or have previously been involved in any capacity or in which their impartiality might reasonably be doubted on any ground, including an actual, apparent or potential conflict of interest.]

[The Prosecutor and Deputy Prosecutors shall not act in relation to a complaint falling in the following cases:

(a) if they themselves are the injured party;

(b) if they are or were a relative of the accused or the injured party;

(c) if they are a national of a complainant State or of a State of which the accused is a national;

(d) if they are the legal representative, supervisor of the guardian or curator of the accused or the injured party;

(e) if they have acted as a witness or an expert witness in the case involving the accused or the injured party; or

(f) if they have acted as the representative, counsel or assistant of the accused in the case involving that accused.]

6. [The [Presidency] [Administrative Council] may excuse the Prosecutor or a Deputy Prosecutor at their request from acting in a particular case, and shall decide any question raised in a particular case as to the disqualification of the Prosecutor or a Deputy Prosecutor.]

[The Prosecutor or a Deputy Prosecutor may not participate in a case in which his impartiality might be doubted on any ground, including an actual, apparent or potential conflict of interest. The [Presidency] [Administrative Council] of the Court may, on its own motion or at the request of the Prosecutor or of a suspect or accused person, excuse a member of the Procuracy from following a case for one of the reasons set out in the preceding paragraph.]

[In case the Prosecutor or a Deputy Prosecutor falls in the cases prescribed in the preceding paragraph, he may be challenged by the accused. The [Presidency] [Administrative Council] shall decide on challenges against the Prosecutor or a Deputy Prosecutor made before the first day of the public trial. Challenges made afterwards shall be decided by the Trial Chamber concerned.]

7. The staff of the Procuracy shall be subject to staff regulations drawn up by the Prosecutor. [The paramount consideration in the employment of the staff of the Procuracy and in the drawing up of the Staff Regulations shall be the necessity of securing the highest standards of efficiency, competence and integrity. In the employment of the staff the Prosecutor should bear in mind the criteria set forth in article [30[6](5)]].

[8. The Prosecutor may choose investigators who shall assist him in his duties and shall be placed under his sole authority. They may carry out any acts for which they have been delegated by the Prosecutor or a Deputy Prosecutor, with the exception of requests for cooperation referred to in Part 9[7] of this Statute. They shall be staff members of the Court within the meaning of this Statute.]

[9. (a) The Prosecutor may request a State Party to make persons available to him to assist him in a particular case;

(b) Such persons shall be under the authority of the Prosecutor for the duration of the case for which they have been made available. They may carry out acts under the conditions established for investigators in article ...]

N.B. See also article 44[31] (Persons made available to assist in a prosecution).

Article 37[13][139]

The Registry

[0. The Registry shall be responsible for the administration and servicing of the Court.]

1. [On the proposal of the [Presidency][Administrative Council], the judges][The General Assembly of Judges] by an absolute majority by secret ballot shall elect a Registrar, who shall be the principal administrative officer of the Court [and shall be under the authority of the [President][Chief Judge] of the Court]. They may in the same manner elect a Deputy Registrar.

2. The Registrar shall hold office for a term of five years, is eligible for re-election [once] and shall be available on a full-time basis. The Deputy Registrar shall hold office for a term of five years or such shorter term as may be decided on [by the judges by consensus][by an absolute majority of the judges], and may be elected on the basis that the Deputy Registrar is willing to serve as required. [Their term shall end in all cases when they reach 65 years of age.]

3. The [Presidency][Administrative Council] may appoint or authorize the Registrar to appoint such other staff of the Registry as may be necessary.

4. The staff of the Registry shall be subject to staff regulations drawn up by the Registrar. [Such regulations shall be circulated to the States parties for comment, whenever possible before they take effect.]

[5. The Registry may be removed by a majority vote of the judges for inadequate performance, malfeasance or other good cause.]

N.B. See also article 39[15] (Loss of office).

N.B. The question of the Victims and Witnesses Unit should also be addressed in this part. See, in this context, article 61[43] (5) (Protection of the [accused], victims and witnesses [and their participation in the proceedings]).

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[139] A/AC.249/1998/WG.7/CRP.1, p. 17.

Article 38[14][140]

Solemn undertaking

1. Before first exercising their functions under this Statute, judges and other officers of the Court shall make a public and solemn undertaking [to do so] [to perform their duties] impartially and conscientiously.

[2. In performing their duties, the officers of the Court and the staff of the Court shall not seek or accept instructions from any Government or any authority outside the Court. They shall refrain from any act incompatible with their status and shall be accountable only to the Court.]

[3. The States Parties undertake to respect the exclusive international character of the duties of the officers of the Court and the staff of the Court and not to seek to influence them in the performance of their duties.]

Article 39[15][141]

Loss of office

1. A judge, the Prosecutor or other officer of the Court who is found to have committed misconduct or a serious breach of [this Statute [such as to jeopardize his independence or his impartiality]] [his official duties], or to be unable to exercise the functions required by this Statute because of long-term illness or disability [duly established by at least two experts], [or if he/she has been engaged in delinquency, whether officially or privately, which raises serious doubts in public confidence in his/her capacity as a judge] [shall] [may] [cease to hold office] [be dismissed under the conditions laid down in paragraph 2 of this article].

[A judge, the Prosecutor or a Deputy Prosecutor shall not be removed against his will except by procedures in this article unless judicially declared mentally or physically incompetent to perform his official duties.]

[1. (a) A [judge] [Prosecutor or Deputy Prosecutor] who has committed misconduct other than those mentioned in the preceding paragraph shall be subject to disciplinary measures as decided by [a two-thirds majority of the judges excluding himself/herself.] [...].]

[1. (b) Discipline, including loss of office against other staff of the Court, shall be governed by the Rules and the Staff Regulations.]

2. A decision as to the loss of office under paragraph 1 shall be made by secret ballot:

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[140] A/AC.249/1998/WG.7/CRP.1, p. 18.

[141] A/AC.249/1998/WG.7/CRP.1, p. 19.

[(a) in the case of the Prosecutor or a Deputy Prosecutor, by an absolute majority of the States Parties;

(b) in any other case, by a two-thirds majority of the judges [excluding himself/herself]].

[further to an assenting opinion of the General Assembly of Judges of the Court, by the General Assembly of States Parties].

[A judge can be removed by a [two-thirds] majority of the States Parties upon request by either [more than three judges] [the Presidency] [the Administrative Council] or more than one tenth of the States Parties.]

3. The judge, the Prosecutor or any other officer whose conduct or fitness for office is [impugned] [challenged under this article] shall have full opportunity to present evidence and to make submissions but shall not otherwise participate in the discussion of the question. [All evidence against him shall be communicated to him.]

4. Discipline, including loss of office against other staff of the Court, shall be governed by the Rules of the Court.

Article 40[16][142]

Privileges and immunities

1. The judges, the Prosecutor, the Deputy Prosecutors and the staff of the Procuracy, the Registrar and the Deputy Registrar shall enjoy the privileges, immunities and facilities of a diplomatic agent within the meaning of the Vienna Convention on Diplomatic Relations of 16 April 1961.

[Members of the Court shall enjoy diplomatic privileges and immunities when engaged in the business of the Court.]

2. The staff of the Registry [and other staff members of the Court] shall enjoy the privileges, immunities and facilities necessary to the [independent] performance of their functions.

3. Counsel, experts and witnesses before the Court shall enjoy the privileges and immunities necessary to the independent exercise of their duties.

4. [The judges may by an absolute majority decide to revoke a privilege or waive an immunity conferred by this article, other than an immunity of a judge, the Prosecutor or Registrar as such. In the case of other officers and staff of the Procuracy or Registry, they may do so only on the recommendation of the Prosecutor or Registrar, as the case may be.]

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[142] A/AC.249/1998/WG.7/CRP.1, p. 20.

[With the exception of those referred to in paragraph 1 of this article, the privileges, immunities and facilities granted may be revoked or waived by a decision taken by an absolute majority, by secret ballot, of the General Assembly of Judges of the Court.]

Article 41[17][143]

Allowances and expenses

1. [The [President][Chief Judge] shall receive an annual allowance.][All permanent members of the Court, as defined in article 29[5] (2) and (3) shall receive remuneration.]

2. The [Vice-Presidents][Deputy Chief Judges] shall receive a special allowance for each day they exercise the functions of the [President][Chief Judge].

3. [Subject to paragraph 4, the judges shall receive a daily allowance during the period in which they exercise their functions. They may continue to receive a salary payable in respect of another position occupied by them consistently with article 34[10].]

[All judges should receive a base salary of no less than half of the salary received by judges of the International Court of Justice. Those who are in function should receive additional compensation on a pro-rata basis up to the maximum of the equivalent compensation received by judges of the International Court.]

4. If it is decided under article 34[10] (4) that judges shall thereafter serve on a full-time basis, existing judges who elect to serve on a full-time basis, and all judges subsequently elected, shall be paid a salary.

Article 42[18][144]

Working languages

The working languages of the Court shall be English and French.

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[143] A/AC.249/1998/WG.7/CRP.1, p. 21.

[144] A/AC.249/1998/WG.7/CRP.1, p. 22.

Article 43[19][145]

Rules of the Court

[0. The rules of organization, functioning and procedure of the Court not set out in this Statute shall appear in the Regulations and the Rules of Procedure of the Court.]

1. [Subject to paragraphs 2 and 3, the judges may][The States Parties [may] [shall]] by an absolute majority make rules for the functioning of the Court in accordance with this Statute, including rules regulating:

(a) the conduct of investigations;

(b) the procedure to be followed and the rules of evidence to be applied;

(c) any other matter which is necessary for the implementation of this Statute.

2. The [initial Rules of the Court][draft regulations and rules of procedure of the Court] shall be drafted by the [General Assembly of] judges within six months of the first elections for the Court, and [submitted to][adopted by] [a conference][the General Assembly] of States Parties [for approval] [which may amend them]. The judges may decide that a rule subsequently made under paragraph 1 should also be submitted to a conference of States Parties for approval. [The rules and regulations adopted in accordance with the preceding paragraph may be amended under the same conditions.]

3. In any case to which paragraph 2 does not apply, rules made under paragraph 1 shall be transmitted to States Parties and may be confirmed by the [Presidency][Administrative Council] unless, within six months after transmission, a majority of States Parties have communicated in writing their objections.

[3a. [Any State Party] [Five States Parties] may propose an amendment to the rules of the Court and file it with the [Registrar][Secretary-General of the United Nations]. The judges may decide by an absolute majority to propose an amendment to the rules of the Court. The [Registrar][Secretary-General] shall communicate to States Parties the amendment proposed by any State Party or by the judges. The amendment shall be considered adopted unless within [three] months from the date of such communication [a majority] of States Parties have communicated in writing their objection.]

4. A rule may provide for its provisional application in the period prior to its approval or confirmation. A rule not approved or confirmed shall lapse.

[5. The judges may by an absolute majority adopt supplementary rules in accordance with the Rules of the Court.]

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[145] A/AC.249/1998/WG.7/CRP.1, p. 23.

Article 44[31]

Persons made available to assist in a prosecution

ILC draft

1. The Prosecutor may request a State Party to make persons available to assist in a prosecution in accordance with paragraph 2.

2. Such persons should be available for the duration of the prosecution, unless otherwise agreed. They shall serve at the direction of the Prosecutor, and shall not seek or receive instructions from any Government or source other than the Prosecutor in relation to their exercise of functions under this article.

3. The terms and conditions on which persons may be made available under this article shall be approved by the Presidency on the recommendation of the Prosecutor.

N.B. Insofar as this article deals with State cooperation, see also article 82[55] (Other forms of cooperation [and judicial and legal [mutual] assistance]).

PART 5. INVESTIGATION AND PROSECUTION

Article 45[25][146]

Complaint by State

1.

Option 1

[[A State Party which is also a Contracting Party to the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948] [A State Party [which accepts the jurisdiction of the Court under article 9[22] with respect to a crime]] may lodge a complaint [referring a [matter] [situation] in which one or more crimes within the jurisdiction of the Court appear to have been committed to] [with] the Prosecutor [alleging that [a crime of genocide] [such a crime] [a crime under article 5[20], subparagraphs [(a) to (d) or any combination thereof]] appears to have been committed] [and requesting that the Prosecutor investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.]]

Option 2

[A State Party [which accepts the jurisdiction of the Court under article 9[22] with respect to a crime] [that has a direct interest] listed under (a) to (d) below may lodge a complaint with the Prosecutor alleging that [such a crime] [a crime under article 5[20] [(a) to (d) or any combination thereof]] appears to have been committed:

(a) a State on the territory of which the act [or omission] in question occurred;

(b) a State of the custody;

(c) a State of the nationality of a suspect;

(d) a State of the nationality of victims.]

[2. A State Party, which, for a crime under article 5[20](e), has accepted the jurisdiction of the Court pursuant to article 9[22] and is a party to the treaty concerned may lodge a complaint with the Prosecutor alleging that such a crime appears to have been committed.][147]

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[146] A/AC.249/1997/L.8/Rev.1, pp. 8-9.

[147] This provision is without any prejudice to the position of delegations with regard to "treaty crimes".

[3. As far as possible, a complaint shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the complainant State.][148]

[4. The Prosecutor shall notify the Security Council of all complaints lodged under article 45[25].]

[Article 46[25 bis][149]

Prosecutor

The Prosecutor [may] [shall] initiate investigations [ex officio] [proprio motu] [or] on the basis of information [obtained] [he may seek] from any source, in particular from Governments, United Nations organs [and intergovernmental and non-governmental organizations]. The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed. [The Prosecutor may, for the purpose of initiating an investigation, receive information on alleged crimes under article 5[20] (a) to (d) from Governments, intergovernmental and non-governmental organizations, victims and associations representing them, or other reliable sources.]][150]

N.B. The terms "sufficient basis" used in this article (if retained) and "reasonable basis" in article 47[26] (1) should be harmonized.

Article 47[26][151]

Investigation of alleged crimes

1. On receiving a complaint [or upon notification of a decision of the Security Council referred to in article 10[23], paragraph 1] [or ex officio upon any other substantiated information], the Prosecutor shall [subject to paragraph 1 bis and ter] initiate an investigation unless the Prosecutor concludes that there is no reasonable basis for a prosecution under this Statute and decides not to initiate an investigation, in which case the Prosecutor shall so inform the [Presidency] [Pre-Trial Chamber].

N.B. The term "reasonable basis" in the opening clause is also used in the criteria listed in 1 bis (i). If the latter is retained, a broader term in the

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[148] Further discussion on the content of a complaint may be necessary in the context of matters dealing with procedures. Due regard may be paid to option B on page 110 of A/51/22, vol. II.

[149] A/AC.249/1997/L.8/Rev.1, pp. 9-10.

[150] The procedure to be followed by the Prosecutor in relation to this article may be discussed further.

[151] A/AC.249/1997/L.8/Rev.1, pp. 14-19.

opening clause might be necessary in order to cover all the criteria listed under paragraph 1 bis.

[1 bis. Prior to initiating investigation the Prosecutor shall:

(a) [notify the States Parties of any complaint [or any decision of the Security Council referred to in article 10[23], paragraph 1], and those States Parties shall so inform the persons within their jurisdiction who are referred to by name in the submission; and]

(b) determine whether:

(i) the complaint provides or is likely to provide a reasonable basis [in law or on the facts] for proceeding with a prosecution under this Statute; and

(ii) the case is or would be admissible under article 11[35]; and

[(ii) bis a prosecution under this Statute would be [in the interests of justice] [taking into account the gravity of the offences] [and the interests of victims];

(iii) [an investigation would be consistent with the terms of any relevant Security Council decision]; and

(iv) to seek a preliminary ruling from the Court regarding the Court's jurisdiction if the case could later be challenged under article 12[36].]

[1 ter. The Prosecutor shall not initiate an investigation where the submission of the case to the Court is challenged under article 11[35] within one month of notification under article 47[26], paragraph 1 bis (a) until the final ruling of the Court.]

2. The Prosecutor may:[152]

(a) request the presence of and question suspects, victims and witnesses;

(b) collect documentary and other evidence [documents, records and articles of evidence];

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[152] It was proposed that the following text be included as the first line of article 47[26], paragraph 2:

"When evidence is in the territory of a State Party whose competent authority is functioning properly, the Prosecutor shall request, as necessary, the Pre-Trial Chamber to seek the cooperation of a State Party pursuant to Part 9[7] of this Statute."

(c)

Option 1

conduct on-site investigations;

Option 2

(i) Except as provided for in this paragraph, when evidence is in the territory of a State, the Prosecutor shall, as necessary, seek the cooperation of that State in order to obtain that evidence. The Prosecutor may conduct investigations on the territory of a State only:

a. [with the consent of its competent authorities] [upon notification of and where necessary with the consent of its competent authorities] [in accordance with Part 9[7]] [subject to the waiver by the competent authorities of the requirement of consent];

[b. When the Pre-Trial Chamber is satisfied that competent authorities to whom a request for assistance under Part 9[7] can be transmitted are not available [or not functioning].]

[(ii) In the case of paragraph (i) (b) above, [such investigations] [investigations of a non-compulsory nature[153]] shall be conducted with the [concurrence] [approval] of the Pre-Trial Chamber [which shall have regard to the views of [interested States]]. [Notification shall be given to the State in question, in particular for the purpose of the State obtaining an extension of the period for execution of a relevant request for judicial assistance.]

[(iii) In the case of paragraph (i) (b) above, the Prosecutor may use compulsory measures for collecting evidence (such as search and seizure and compelling the attendance of witnesses) based upon a valid warrant issued by the Pre-Trial Chamber.]

(d) take necessary measures to ensure the confidentiality of information or the protection of any person [, including victims];

[(d) bis The Prosecutor shall take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, and in so doing, respect the interests and personal circumstances of victims and witnesses, including age, gender and health, and take into account the nature of the crime, in particular, but not limited to, where it involves sexual or gender violence or violence against children;]

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[153] This set of square brackets will apply if paragraph (iii) is accepted.

N.B. See also article 61[43] (2) (Protection of the [accused], victims and witnesses [and their participation in the proceedings]).

(e) as appropriate, seek the cooperation of any State or of the United Nations, [or of any peacekeeping force that may be present in the territory where an investigation is to be undertaken];

[(f) where documents or information have been obtained by the Prosecutor upon a condition as to their confidentiality, which are, or are intended to be, used solely for the purposes of generating new evidence, agree that such documents or information will not be disclosed at any stage of the proceedings unless the provider of the information consents.]

N.B. This paragraph, as well as articles 51[27] (5) (f) (Commencement of prosecution), 54[30] (1 bis) (Notification of the indictment), 61[43] (9) (Protection of the [accused], victims and witnesses [and their participation in the proceedings]), 64[44 ter] (Confidential information), 65[45] (Quorum and judgement), 79[53] (5) ([Surrender] [Transfer] [Extradition] of persons to the Court), 82[55] (5) (Other forms of cooperation [and judicial and legal [mutual] assistance]) and 86[59] (3) (c) (Role of States in enforcement [and supervision] of sentences of imprisonment) all relate to confidentiality and they should be examined with a view to avoiding any duplication or contradiction.

[(g) enter into such arrangements or agreements, not otherwise inconsistent with this Statute, as may be necessary to secure the cooperation or assistance of a State or person in the investigation.]

N.B. In the final drafting of paragraph 2, attention should be given to harmonizing the use of the words "shall" and "may".

3. The [Presidency] [Pre-Trial Chamber] may, at the request of the Prosecutor, issue such subpoenas [, orders] and warrants as may be required for the purposes of an investigation, including a warrant under article 52[28], paragraph 1, for the pre-indictment arrest of a suspect.

4. If, upon investigation and having regard, inter alia, to the matters referred to in article 11[35], the Prosecutor concludes that [a case is inadmissible under article 11[35] or] there is [not a sufficient basis for a prosecution] [no prima facie case] under this Statute [or a prosecution would not be in the interests of justice] [taking into account the interests of victims] and decides not to file an indictment, the Prosecutor shall so inform the [Presidency] [Pre-Trial Chamber], as well as the complainant State [or the Security Council, in a case to which article 10[23], paragraph 1, applies], giving details of the nature and basis of the complaint and of the reasons for not filing an indictment.

[4 bis. A decision referred to in paragraph 4 based on considerations of the interests of justice shall only become effective upon its having been confirmed by the [Presidency] [Pre-Trial Chamber] under paragraph 5 of this article.]

5. At the request of a complainant State [or, in a case to which article 10[23], paragraph 1, applies, at the request of the Security Council,] the [Presidency] [Pre-Trial Chamber] [shall] [may] review a decision of the Prosecutor not to initiate an investigation or not to file an indictment, and may request the Prosecutor to reconsider the decision [but it may do so only once] [: provided that the Prosecutor, any suspect and the complainant State [or the Security Council (as the case may be)] shall be informed of such review proceedings or confirmation proceedings within the contemplation of paragraph 4 of this article which involves a decision based on considerations of the interests of justice and shall be entitled to submit his/her/their/its viewpoints with regard thereto, which viewpoints shall be considered by the [Presidency] [Pre-Trial Chamber] in coming to its decision].

[When new information is brought to his/her attention regarding the facts in respect of which he or she decided not to initiate an investigation or not to institute proceedings, the Prosecutor may reconsider his/her decision.]

[5 bis. After a determination to initiate an investigation in accordance with article 47[26], paragraph 2, and prior to the commencement of a trial, a State requested by the Prosecutor to carry out investigations or a State on the territory of which the Prosecutor intends to conduct investigations may challenge the decision of the Prosecutor to initiate an investigation before the Pre-Trial Chamber on the grounds of lack of sufficient basis for a prosecution under this Statute.]

6. A person suspected of a crime under this Statute shall have the right:

(a) prior to being questioned, to be informed that the person is a suspect [, of the conduct that the person is alleged to have committed which may constitute a crime under this Statute] and of the rights under (b) to (d) hereafter;

(b) to remain silent, without such silence being a consideration in the determination of guilt or innocence;

(c) to have [at all times] [in connection with questioning] the [prompt] [competent] legal assistance of the person's choosing; [or, if the person does not have legal assistance, to have legal assistance assigned by the Court in any case where the interests of justice so require, including where the person is unable to secure counsel, and without payment if the person lacks sufficient means to pay for such assistance];

[(d) to be questioned in the presence of counsel unless the suspect has voluntarily waived his or her right to counsel;]

(e) not to be compelled to testify or to confess guilt nor to be subjected to any form of coercion, duress or threat;

(f) if questioned in a language other than [a language the person understands and speaks] [his or her own language], to have, free of any cost, the assistance of a competent interpreter and a translation of any document on which the person is to be questioned;

(g) not to be subjected to torture, or to cruel, inhuman or degrading treatment or punishment.

[6 bis. Evidence obtained during questioning in violation of these rights shall under no circumstances be used in the trial unless they are favourable to the suspect.][154]

[7. (a) The Prosecutor shall fully respect the rights of suspects under the Statute and the Rules.

(b) [To establish the truth the Prosecutor shall [ex officio] extend the investigation to cover all facts and evidence that are relevant to an assessment of the charge and to the legal consequences that may follow. The Prosecutor shall investigate equally incriminating and exonerating circumstances.]

(c) [If the Prosecutor concludes that there is a basis for prosecution under this Statute, he shall, in accordance with the Rules of the Court, investigate the case by seeking the cooperation of the States concerned or by himself, and such investigation shall be conducted in conformity with international law and fully respecting the sovereignty of the States concerned.]][155]

[8. (a) A person suspected of committing a crime within the meaning of this Statute:

(i) shall, as soon as he is involved in an investigation or prosecuted under this Statute, be entitled to collect all of the evidence that he deems necessary for his defence;

(ii) may either collect this evidence himself or request the Pre-Trial Chamber of the Court to accomplish certain acts, seeking, where necessary, cooperation from any State Party.

The Pre-Trial Chamber may reject the request.

(b) If the suspect elects to collect the evidence himself in accordance with ~~article 26,~~ this paragraph ~~3 (a)~~, he may apply to the Presidency for the following orders and subpoenas: [list to be inserted]]

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[154] This paragraph will be discussed in connection with article 62[44].

[155] This paragraph will be discussed in connection with article 36[12].

N.B.

- **In view of the length of the article, consideration may be given to placing some of its elements in a separate article.**

- **The drafting of this article might need revision in the light of the decisions to be taken in respect of article 50[26 quater] (Functions of the Pre-Trial Chamber in relation with investigation).**

[Article 48[26 bis][156]

Information on national investigations or proceedings

N.B. This title is suggested in case the article is retained.

1. States Parties shall promptly inform the Prosecutor about national investigations or proceedings undertaken with respect to the alleged commission of a crime within the jurisdiction of the Court. Such information shall be confidential to the extent necessary and shall include a concise statement of the circumstances of the alleged crime, the identity and whereabouts of any suspect (or accused), and the progress of the investigation or proceeding concerned.

2. The Prosecutor shall examine the information received from the State(s) Party(ies) concerned and if he/she believes, having regard to the matters referred to in article 11[35], that the conditions exist for having the Court entertain the case, shall seek a ruling from the Pre-Trial Chamber and inform of his/her decision the State(s) Party(ies) concerned and the suspect (or accused). The Prosecutor may also request the State(s) Party(ies) concerned to provide additional information about the national investigation or proceeding within a given time, and defer a decision until he/she has examined such additional information.

3. The States Parties to the present Statute undertake to submit periodical reports to the Prosecutor on the measures they have adopted which give effect to the prosecution of crimes falling within the jurisdiction of the Court.]

[Article 49[26 ter][157]

Deferral of an investigation by the Prosecutor

1. In the event that the Prosecutor, having regard to the matters in article 11[35], defers an investigation, then the Prosecutor [may request that]

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[156] A/AC.249/1997/L.9/Rev.1, p. 21.

[157] A/AC.249/1997/L.9/Rev.1, p. 22.

[may seek an order of the Court that] the relevant State make available to the [Prosecutor] [Court] information on the proceedings.[158]

2. Any information so provided will, to the extent necessary, be kept confidential.

3. If the Prosecutor thereafter decides to proceed with an investigation, he or she shall notify the State in respect of whose proceedings deferral has taken place.]

[Article 50[26 quater]][159] [160]

Functions of the Pre-Trial Chamber in relation with investigation[161]

1. [Where the Prosecutor intends to take an investigative action which may] [When the Prosecutor considers an investigation to] present a unique

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[158] The term "proceedings" covers both investigations and prosecutions (see A/AC.249/1997/L.8/Rev.1, annex I, article 11[35], note 24).

[159] This article is reproduced from document A/AC.249/1997/L.8/Rev.1, p. 20, where it appears as 26 ter. To avoid confusion, it has been renumbered as 50[26 quater].

[160] Article 50[26 quater] was tabled by some 15 interested delegations at the August 1997 meeting of the Preparatory Committee. It was written de novo and did not derive from any particular delegation's proposal.

The proposal contemplates that, in exceptional circumstances in which a unique opportunity appears to exist for the taking or collection of evidence, the Pre-Trial Chamber may be involved in order to assure a fair trial/protect the interests of the defence.

Some delegations believed that the authority of the Pre-Trial Chamber set out in the proposal should be exercised only to collect and preserve evidence for the defence. In relation to the Prosecutor's investigation, the Pre-Trial Chamber should only intervene for the purpose of checking on the lawfulness of the Prosecutor's conduct.

The alternative options reflect differing views as to the balance to be struck between the need to ensure the Prosecutor's independence and the desirability of conferring a limited role on the Pre-Trial Chamber.

If this proposal is adopted, it seems likely that other proposals in relation to article 47[26] could be deleted or may need revision. Consideration would need to be given to article 47[26] (1), (2) ((a), (b), (c), (e) and (g)), (3), (4), (4 bis), (5), (5 bis) and (8).

[161] The powers contemplated by this draft provision include the power for the Pre-Trial Chamber to seek judicial assistance from a State.

opportunity, which may not be available subsequently for the purposes of a trial, to take testimony or a statement from a witness, or to examine, collect or test evidence, [the Prosecutor shall] [, if the suspect/accused has not been identified or is not available] inform the Pre-Trial Chamber; and] the Pre-Trial Chamber, on the request of the Prosecutor, [or a suspect,] [or on its own initiative,] may take such measures as may be necessary to assure the efficiency and integrity of the proceedings, and in particular to protect the rights of the defence.

2. These measures may include the power:

(a) to make [orders] [recommendations] [orders and recommendations] regarding procedures to be followed;

(b) to direct that a record be made of the proceedings;

(c) to appoint an expert to assist;

(d) to authorize counsel for a suspect to assist, or where suspects have not been identified or have not designated counsel, appoint a lawyer to attend and represent the interest of the defence;

(e) to name one of its members [or an available judge of the Court]:

(i) to observe and make [orders] [recommendations] [orders and recommendations] regarding the collection and preservation of evidence or the questioning of persons;

(ii) to decide on questions of law; or

(iii) to take such other actions as may be necessary to collect or preserve evidence [favourable to the defence] [relevant to the case].

Option: [When in the course of a proceeding a unique opportunity presents itself to collect evidence, the Pre-Trial Chamber may, at the request of the Prosecutor or of the suspect, name one of its members or an available judge of the Court to take necessary measures to collect or preserve evidence, while respecting the rights of the defence.]

3. [If any [order] [recommendation] [order and recommendation] of the Pre-Trial Chamber is breached or is not complied with, the Pre-Trial Chamber may:

(a) reject the admissibility of any evidence obtained as a result or consequence of such a breach or non-compliance; or

(b) consider such breach or non-compliance in respect of whether any weight should be attached to any evidence obtained as a result or consequence of such breach or non-compliance.]

Article 51[27][162]

Commencement of prosecution

1. If upon investigation [in the course of an investigation] the Prosecutor, having regard to the matters referred to in article 11[35], concludes that [the case is admissible, and] [a case does exist against one or more persons named,] [there is a prima facie case] [there is sufficient evidence that could justify a conviction of a suspect, if the evidence were not contradicted at trial,] [which the accused could be called on to answer and that is desirable in the interests of justice that the case should proceed], the Prosecutor shall file with the Registrar an indictment containing a concise statement of the allegations of fact and of the crime or crimes with which the suspect is charged in respect of each of the persons referred to, their name and particulars, a statement of the allegations of fact against them, and the characterization of these facts within the jurisdiction of the Court and shall be accompanied by [relevant] [sufficient] evidence collected by the Prosecutor for the purposes of confirmation [of the indictment] by the [Presidency] [Pre-Trial Chamber].

[2. The [Presidency] [Pre-Trial Chamber] shall examine the indictment, any amendment and any supporting material and determine whether:

(a) ~~whether~~ [a prima facie case exists] [there is sufficient evidence that could justify a conviction of a suspect, if the evidence were not contradicted at trial] [there is strong evidence against the accused] with respect to a crime within the jurisdiction of the Court; and

(b) ~~whether,~~ having regard, inter alia, to the matters referred to in article 11[35], the case should on the information available be heard by the Court [if the Court has not yet ruled on this issue];

[(c) ~~whether~~ it is desirable in the interests of justice that the case should proceed;]

If so, it shall [by majority/consensus] confirm the indictment and establish a trial chamber in accordance with article 33[9] [, and inform the Presidency].]

[2 bis. Any State concerned may challenge the decision of the Prosecutor to file an indictment before the Pre-Trial Chamber on grounds of inconsistency with this Statute.]

[2 ter. After the filing of an indictment, the Pre-Trial Chamber shall [in any case] [if the accused is in custody or has been judicially released by the Court pending trial] notify the indictment to the accused, [set a deadline prior to the confirmation hearing, until which the Prosecutor and the defence may add new evidence [for purposes of such confirmation hearing]], and set a date for the review of the indictment. The hearing shall be held in the presence of the

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[162] A/AC.249/1997/L.8/Rev.1, pp. 21-25.

Prosecutor and the accused, as well as his/her counsel, subject to the provisions of paragraph 4 bis. In the hearing, the accused shall be allowed to object to the indictment and criticize the material on which it is based.

Following the hearing, the Pre-Trial Chamber may:

(a) confirm the indictment in its entirety;

(b) confirm only part of the indictment [and amend it], by giving a different qualification to the facts;

[(c) order further investigation];

(d) refuse to confirm the indictment.

When it confirms the indictment in its entirety or in part, the Pre-Trial Chamber shall commit the accused to the Trial Chamber for trial on the indictment as confirmed. Confirmation of indictment shall uphold the warrants issued earlier, except if the Court decides otherwise.]

3. If, after any adjournment that may be necessary to allow additional material to be produced, the [Presidency] [Pre-Trial Chamber] decides not to confirm the indictment, it shall so inform the complainant State [or, in a case to which article 10[23] (1) applies, the Security Council].

[If it does not confirm the indictment, all the warrants issued prior to the decision of non-confirmation shall cease immediately to have effect.]

[3 bis. The dismissal of a count in an indictment shall not preclude the Prosecutor from subsequently bringing a new indictment based on the acts underlying that count if supported by additional evidence.]

[4.

Option 1

The [Presidency] [Pre-Trial Chamber] may [, on its own or] at the request of the Prosecutor amend the indictment [, in which case it shall make any necessary orders to ensure that the accused is notified of the amendment and has adequate time to prepare a defence] [after hearing the accused, provided that the Trial Chamber is satisfied that the accused is not prejudiced in his rights to defend himself].]

Option 2

Prior to the confirmation of the indictment by the Pre-Trial Chamber, the Prosecutor may amend or withdraw the indictment. [The accused shall be informed of the withdrawal as well as of any amendment. In the event of withdrawal, the Pre-Trial Chamber may, under the provisions provided for in article 47[26], ask the Prosecutor to reconsider his/her decision.]

After the confirmation of the indictment, the Prosecutor may amend the indictment only with the permission of the Pre-Trial Chamber, and after notice to the accused. If the Prosecutor is seeking to add additional charges or to substitute more serious charges for those in the confirmed indictment, the new or amended charges must be confirmed by the Pre-Trial Chamber in accordance with the procedures for confirmation of the indictment set out in paragraph [...].

After the commencement of the trial, the Prosecutor may withdraw the indictment or certain charges within the indictment only with the permission of the Trial Chamber].

[In case of withdrawal of the indictment after the confirmation thereof, new prosecution may be instituted for the same offence only based upon a newly discovered material evidence which was not available to the Prosecutor at the time of the withdrawal in the interest of the defence.]

N.B. Consideration may be given to limiting paragraph 4 to the main principles regarding amendment and withdrawal of the indictment while addressing the details in the Rules.

[4 bis.[163] When one or more of the accused has fled or cannot be found, and when all reasonable steps have been taken to inform the accused, the Pre-Trial Chamber may still hold a hearing in order to examine whether it shall confirm the indictment. In that case, the accused cannot be represented by counsel.

When it confirms the indictment, in its entirety or in part, against an accused who has fled or cannot be found, the Pre-Trial Chamber shall issue a warrant to search for, arrest and transfer the accused, which is tantamount to committing him to the Trial Chamber for trial.]

[4 ter. Anyone who has [personally] suffered [direct] injury caused by a crime submitted to the Court, [the legal representatives of victims, victims' relatives, successors and assigns,] may inform the [Prosecutor] [and the] [Pre-Trial Chamber] in writing of the acts having caused injury to him/her/them and the nature and amount of the losses which he/she/they has/have sustained.

When it confirms the indictment, in its entirety or in part, the Pre-Trial Chamber may order provisional measures which may be necessary [in order to enable a Trial Chamber, upon a subsequent conviction,] to compensate the victim designated in the above paragraph. For that purpose, the Pre-Trial Chamber shall seek the cooperation of the interested States.

Such provisions shall also apply when the accused has fled or cannot be found.]

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[163] The Working Group decided to defer the consideration of paragraph 4 bis of article 51[27] for such time as article 56[37] is considered.

N.B. Paragraph 4 ter should be considered together with article 66[45 bis] (Compensation to victims).

5. The [Presidency] [Pre-Trial Chamber] [Trial Chamber] may make any further orders required for the conduct of the trial, including an order:

(a) determining the language or languages to be used during the trial;

(b)

Option 1

requiring the disclosure to the defence [of the relevant evidence that the defence requests] within a sufficient time before the trial to enable the preparation of the defence, of [relevant] documentary or other evidence available to the Prosecutor [, whether or not the Prosecutor intends to rely on that evidence] [which the Prosecutor intends to rely upon]; [if the Prosecutor fails to comply with an order under this subparagraph, the evidence in question will be inadmissible at the trial;]

Option 2

save in respect of documents or information referred to in article 47[26], paragraph 2 (f), and subject to subparagraph (f) below, requiring the disclosure to the defence of documents or information which are either considered [material] [relevant] to the preparation of the defence, or are intended for use by the Prosecutor at trial or were obtained from the accused;[164]

(c) providing for the exchange of information between the Prosecutor and the defence, so that both parties are sufficiently aware of the issues to be decided at the trial;

(d) providing [, at the request of either party or a State, or at the instance of the Court on its own volition,] for the protection of the accused, victims and witnesses and of confidential information;

(e) providing [, at the request of either party or a State, or at the instance of the Court on its own volition,] for the protection and privacy of victims and witnesses;

[(f) providing, at the request of either party or a State, or at the instance of the Court of its own volition, for the non-disclosure or protection of documents or information provided by a State the disclosure of which would [endanger] [prejudice] the national security or national defence interests of a State in accordance with criteria to be specified in rules made pursuant to this Statute.]

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[164] [Quaere: definition of "relevant" for the Rules?]

N.B. Subparagraphs (d), (e) and (f) of paragraph 5 could be consolidated further.

Article 52[28][165]

Arrest

1. At any time after an investigation has been initiated, the [Presidency] [Pre-Trial Chamber] may at the request of the Prosecutor issue a warrant for the pre-indictment arrest of a suspect if there are reasonable grounds[166] [167] to believe that:

(a) the suspect has committed a crime within the jurisdiction of the Court; and

(b) taking the suspect into custody is necessary to ensure that the suspect does not:

(i) fail to appear for trial;

[(ii) [interfere with or destroy evidence;][168]

[(iii) [intimidate] [influence] witnesses or victims;]

[(iv) engage in collusion with accomplices;] or

[(v) [continue to commit a crime within the jurisdiction of the Court.][169]

[The Pre-Trial Chamber may also issue a warrant of judicial supervision in order to place a person under restrictions of liberty other than arrest.][170]

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[165] A/AC.249/1997/L.9/Rev.1, pp. 23-25.

[166] The term "reasonable grounds" was understood to embody objective criteria.

[167] Some delegations preferred other terms such as "serious reasons".

[168] Some delegations suggested that subparagraphs (ii), (iii) and (iv) could be merged under a more general formulation such as "obstructing or endangering the investigation or the court proceedings".

[169] Some delegations favoured addressing situations in which the accused may be harmed or at risk. Other delegations stated that the accused could be adequately protected under article 61[43].

[170] It was suggested that this provision could be deleted because it is addressed in article 53[29], paragraph 5.

[No person shall be subjected to arbitrary arrest or detention. Nor shall any person be deprived of his liberty except on such grounds and in accordance with such procedures as are established by the rules of the Court.][171]

2. (a) The warrant for the pre-indictment arrest shall be deemed to have lapsed and the request for the pre-indictment arrest of a suspect shall be deemed to have been withdrawn if [the indictment has not been confirmed] [a post-indictment warrant has not been served] within [30] [60] [90] days of the arrest, or in exceptional circumstances such longer time up to a total of [60] [90] days as the [Presidency] [Pre-Trial Chamber] may allow.

(b) In the case of a State Party which has notified the Court under article 80[53 bis] (1 bis) that it can surrender pre-indictment, the warrant for the pre-indictment arrest of a suspect shall be deemed to have been withdrawn if [the indictment has not been confirmed] [a post-indictment warrant has not been confirmed] [a post-indictment warrant has not been served] within [30] [60] [90] days of the surrender, or in exceptional circumstances such longer time up to a total of [60] [90] days as the [Presidency] [Pre-Trial Chamber] may allow.

If the Prosecutor decides not to indict the suspect or the [Presidency] [Pre-Trial Chamber] decides not to [confirm the indictment] [not to issue a post-indictment warrant], the Prosecutor shall immediately advise the custodial State of that fact.[172]

3. "Opening clause":

Option 1

[In the case where no pre-indictment warrant has been obtained,] [Prior to the confirmation hearing,] [As soon as practicable] [after the confirmation of the indictment], the Prosecutor shall seek from the [Presidency] [Pre-Trial Chamber] a [post-indictment] warrant for the arrest and transfer of the accused. The [Presidency] [Pre-Trial Chamber] shall issue such a warrant unless it is satisfied that:

Option 2

Upon confirmation of the indictment, a warrant for the arrest of the accused shall be issued by the Pre-Trial Chamber, unless, having heard the views of the Prosecutor, it is satisfied that:

(a) the accused will voluntarily appear for trial and none of the other factors in paragraph 1 (b) are present]; or

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[171] It was suggested that this provision could be moved to article 47[26], paragraph 6.

[172] It was suggested that the questions of release and re-arrest could be addressed in another provision of this Statute.

(b) there are special circumstances making it unnecessary for the time being to issue the warrant.

4. The Court[173] shall transmit the warrant to any State where the person may be located, along with a request for the provisional arrest, or arrest and [surrender, transfer, extradition] of the person under Part 9[7].

5. [Pre-indictment and post-indictment warrants may also be issued when the accused is a fugitive. In this case, the post-indictment warrant issued by the Pre-Trial Chamber shall have the effect of an international warrant and shall be disseminated by all appropriate means. When the accused is apprehended, the authorities shall proceed as provided for in Part 9[7].]

6. [A post-indictment warrant shall remain in effect until the date of the judgement. The effects of the warrant delivered by the Pre-Trial Chamber shall not be interrupted by the actions challenging the submission of cases to the Court.]

Article 53[29][174]

Pre-trial detention or release

1. [The States [Parties] [in which the person is located] [and in which the crime was committed] shall be notified of a warrant issued by the Pre-Trial Chamber.] The State that has received a pre- or post-indictment warrant and a request for the arrest of a person under article 52[28] (5) shall immediately [in accordance with its laws][175] [[and] in accordance with the provisions of Part 9[7] of this Statute] take steps to arrest the suspect [on the basis of the warrant issued by the Court or by obtaining a domestic warrant for arrest based on the Court's warrant and request].[176]

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[173] The term "Court" is understood to include its constituent organs, including the Prosecutor, as defined in article 29[5].

[174] A/AC.249/1997/L.9/Rev.1, pp. 26-27.

[175] Under article 52[28] (5), a warrant for pre-indictment arrest is forwarded to the State in which the individual sought may be located, along with a request for provisional arrest or transfer/surrender under Part 9[7]. If Part 9[7] specifies the extent to which national laws apply to requests for provisional arrest or transfer/surrender, it will be unnecessary to treat this issue here as well.

[176] The issue of whether a State can decline to arrest and detain a person, pending resolution of a challenge under article 12[36], could be dealt with in that article.

[1 bis. The Prosecutor may, with the consent of the Pre-Trial Chamber, execute a warrant for arrest by him or herself only in cases where the competent authority of the State Party concerned may not be available or may be ineffective.][177]

2. A person arrested shall be brought promptly before a competent judicial authority in the custodial State who shall determine, in accordance with the law of that State, that the warrant applies to that person and the person has been arrested in accordance with the proper process and that the person's rights have been respected.

3. The person shall have the right to apply to [the competent judicial authority in the custodial State] [the Pre-Trial Chamber] for interim release pending [surrender] [transfer] [extradition] [in accordance with its national law]. [The custodial State shall take into account the views of the Prosecutor [and Court] on interim release.]

N.B. The term "Court", if retained in this paragraph, should be clarified.

4. After the [decision to] [surrender] [transfer] [extradite] to the Court, the person may apply to the [Presidency] [Pre-Trial Chamber] for interim release pending trial.

5. The person shall be detained unless the [Presidency] [Pre-Trial Chamber] is satisfied that the person will voluntarily appear for trial and none of the other factors in article 52[28] (1) (b) are present. If it decides to release the person, it may do so with or without conditions [or may issue a warrant of judicial supervision restricting the person's liberty other than by arrest]. [The [Presidency] [Pre-Trial Chamber] shall also, on its own initiative, review its ruling periodically. If satisfied that changed circumstances require that the ruling be modified, it may order any measure provided for in paragraph 4.]

N.B. Reference to "any measure provided for in paragraph 4" should be revised in the light of the current language of paragraph 4.

6. (a) The [Presidency] [Pre-Trial Chamber] may, either of its own initiative or at the request of the person concerned or the Prosecutor, modify its ruling as to detention [, judicial supervision] or conditional release in effect at that time.

[(b) The person may be detained prior to trial for a maximum of one year; however, this period may be extended up to an additional year by the [Presidency] [Pre-Trial Chamber] if the Prosecutor can demonstrate that he or

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[177] This provision raises a host of issues, including under what conditions the Prosecutor should be able to exercise such authority, whether the Prosecutor would have adequate resources to do so, and whether such issues should be addressed elsewhere in the Statute.

she will be ready for trial within that period and can show good cause for the delay.]

(c) The person and the Prosecutor may appeal the [Presidency's] [Pre-Trial Chamber's] determination regarding release or detention to the Appeals Chamber.

7. If necessary, the [Presidency] [Pre-Trial Chamber] may issue a warrant of arrest to secure the presence of an accused who has been released.

8. A person arrested may apply to the [Presidency] [Pre-Trial Chamber] for a determination of the lawfulness under this Statute of any arrest warrant or order of detention issued by the Court. If the [Presidency] [Pre-Trial Chamber] decides that the arrest or detention was unlawful under the Statute, it shall order the release of the person, [and may award compensation] [in accordance with article ...].[178]

9. [A person arrested shall be held, pending trial or release on bail, in an appropriate place of detention in the arresting State, in the State in which the trial is to be held, or if necessary in the host State.] [Once ordered [surrendered] [transferred] [extradited] by the custodial State, the person shall be delivered to the Court as soon as possible, and shall be held in an appropriate place of detention in the host State or other State in which the trial is to be held.]

Article 54[30][179] [180]

Notification of the indictment

N.B. It might be necessary to broaden the title of this article to cover the whole of its content.

1. The [Prosecutor] [Registrar] shall ensure, where necessary with the cooperation of national authorities, that a person who has been arrested is personally served, as soon as possible after being taken into custody, with certified copies of the following documents, ~~in a language understood by that person~~ [in a language that the accused understands] [in his own language]:

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[178] A number of issues were raised regarding compensation, including whether it should be mandatory or discretionary, whether it should be granted even when the Prosecutor acted in good faith, whether such determination is not appropriate until the judgement becomes final and whether granting compensation may prevent the Prosecutor from diligently carrying out his or her duties.

[179] A/AC.249/1997/L.8/Rev.1, pp. 25-27.

[180] The wording of this article might be modified in the light of the decisions to be taken as regards the question of hearing of the confirmation of an indictment.

(a) in the case of the pre-indictment arrest of a suspect, [a statement of the grounds for the arrest] [the warrant of arrest or restriction of liberty];

(b) in any other case, the confirmed indictment;

(c) a statement of the [accused's] [arrested person's] rights under [articles 47[26] or 60[41] of] this Statute and the Rules [, as applicable].

[1 bis. An indictment shall be made public, except in the following situations:

(a) The [Presidency] [Pre-Trial Chamber] may, at the request of the Prosecutor, order that there be no public disclosure of the indictment until it is served on the accused, or in the case of joint accused, on all the accused. In exercising its discretion, the [Presidency] [Pre-Trial Chamber] shall take account of all relevant factors, including the potential for pre-arrest flight of an accused, destruction of evidence and harm to victims or witnesses if the indictment is made public;

(b)[181] The [Presidency] [Pre-Trial Chamber] may, at the request of the Prosecutor, also order that there be no disclosure of an indictment, or part thereof, or of all or any part of any particular document or information, if satisfied that the making of such an order is required to give effect to a provision of the Rules, to protect confidential information obtained by the Prosecutor, or is otherwise in the interests of justice.]

2. In any case to which paragraph 1 (a) applies, the indictment shall be served on the accused as soon as possible after it has been confirmed.

3. If, 60[182] days after the indictment has been confirmed, the accused is not in custody pursuant to a warrant issued under article 52[28] (3), or for some reason the requirements of paragraph 1 cannot be complied with, the [Presidency] [Pre-Trial Chamber] [the Registrar] [may] [shall] on the application of the Prosecutor prescribe some other manner of bringing the indictment to the attention of the accused.

~~[4.][183]~~

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[181] The contents of this subparagraph could become the subject matter of the provision being negotiated on questions of confidentiality, disclosure and protection of information.

[182] The matter concerning a specific deadline may be more appropriate for the rules of procedure.

[183] ~~Former paragraph 4 of the abbreviated compilation of proposals on procedural matters (4 August 1997) (hereinafter abbreviated compilation) could become a subject matter for the rules of procedure.~~

[5. [The accused ~~is~~] [Anyone suspected of committing a crime within the meaning of this Statute ~~shall be~~] shall be entitled:

(a) to be informed promptly of the nature and cause of the charge against him or her [and be questioned in a language which he understands, and, to this end, to have the free assistance of a competent interpreter, and to be provided free of charge with a translation of the documents on the basis of which he is being questioned or that show why a measure infringing upon his liberty or property has been proposed];

(b) [to have adequate time and facilities for the preparation of his or her defence and to communicate with counsel;] [to be assisted promptly by a lawyer of his own choosing, or, if he does not have sufficient means to pay for one, by a lawyer appointed by the [Pre-Trial Chamber of the] Court;]

(c) [before being questioned, or when a measure infringing upon his liberty or property has been proposed and brought to his attention, to be fully informed of the charges against him and the rights to which he is entitled under paragraph 1 of this article.]]

PART 6. THE TRIAL

Article 55[32]

Place of trial

N.B. This article was not considered by the Preparatory Committee in 1997.

ILC draft

Unless otherwise decided by the Presidency, the place of the trial will be the seat of the Court.

Other proposals contained in A/51/22, vol. II[184]

Competent organ and criteria to decide the place of the trial

1. Unless otherwise decided in accordance with paragraph 2, the place of the trial will be the seat of the Court.

2. The [Presidency] [General Assembly of the States parties] may authorize the [Trial Chamber] [Court] to [exercise its functions at a place other than the seat of the Court] [sit in a State Party other than the host State] [for a particular case] [where it will ensure the efficient conduct of the trial and is in the interests of justice] [or] [when travel by the members of the Court is likely to make the proceedings simpler and less costly].[185]

3. [(a) The Presidency of the Court shall make inquiries with the State Party that appears likely to receive the Court.

[(b) After the State Party likely to receive the Court has agreed, the decision [under the preceding paragraph] to hold a session away from the Court's seat shall be taken by the General Assembly of the States Parties, which shall be informed either by one of its members, the Presidency, the Prosecutor or the General Assembly of the Judges of the Court.]

4. With the express agreement of the State Party receiving the Court, the privileges, immunities and facilities provided for in article [10[23]?] shall continue to be effective when the Court holds a session pursuant to [this article] [the three preceding paragraphs].

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[184] P. 150.

[185] This raises a number of issues, including the need for agreement of States Parties or the host State for a trial chamber to exercise its function away from the seat of the Court and whether authority to initiate such a step should rest with the President or the trial chamber.

5. The provisions of this article shall also apply to non-party States which, after inquiries by the Presidency, state that they agree to receive the Court and to grant the privileges, immunities and facilities provided for in article [10[23]?].

N.B. Some of the issues raised in the proposals may be dealt with in the Rules.

Article 56[37][186]

Trial in presence of the accused

Comment: There appear, in essence, to be three options regarding trials in absentia which have emerged to date, in addition to the ILC draft, that appear in the Report, volume II. The ILC text and the proposed options are set out below:

N.B. The ILC text as such could be deleted since it seems to have been superseded by the options that were developed as a consequence of the discussions at the Preparatory Committee.

ILC draft

1. As a general rule, the accused should be present during the trial.

2. The Trial Chamber may order that the trial proceed in the absence of the accused if:

(a) the accused is in custody, or has been released pending trial, and for reasons of security or the ill-health of the accused it is undesirable for the accused to be present;

(b) the accused is continuing to disrupt the trial; or

(c) the accused has escaped from lawful custody under this Statute or has broken bail.

3. The Chamber shall, if it makes an order under paragraph 2, ensure that the rights of the accused under this Statute are respected, and in particular:

(a) that all reasonable steps have been taken to inform the accused of the charge; and

(b) that the accused is legally represented, if necessary by a lawyer appointed by the Court.

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[186] A/AC.249/1997/L.8/Rev.1, p. 27.

4.[187] In cases where a trial cannot be held because of the deliberate absence of an accused, the Court may establish, in accordance with the Rules, an Indictment Chamber for the purpose of:

(a) recording the evidence;

(b) considering whether the evidence establishes a prima facie case of a crime within the jurisdiction of the Court; and

(c) issuing and publishing a warrant of arrest in respect of an accused against whom a prima facie case is established.

5. If the accused is subsequently tried under this Statute:

(a) the record of evidence before the Indictment Chamber shall be admissible;

(b) any judge who was a member of the Indictment Chamber may not be a member of the Trial Chamber.

* * *

Option 1

The trial shall not be held if the accused is not present.[188]

Option 2

General rule

1. As a general rule, the accused shall be present during the trial.

Exceptions

2. In exceptional circumstances, the Trial Chamber may order that the trial proceed in the absence of the accused, if the accused, having been present at the commencement of the trial thereafter:

(a) has escaped from lawful custody or has broken bail; or

[(b) is continuing to disrupt the trial.][189]

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[187] The questions addressed in paragraphs 4 and 5 may be better dealt with in the context of the pre-trial proceedings.

[188] Option 1 prohibits trial in absentia without any exception; like option 2, it would deal with procedures needed to preserve evidence for trial as a matter separate from trial in absentia.

[189] Some proponents of option 2 do not agree that this should necessarily be a basis for a trial in absentia.

Rights of the accused

3. The Trial Chamber shall, if it makes an order under paragraph 2, ensure that the rights of the accused under this Statute are respected, and in particular that the accused is legally represented, if necessary by a lawyer appointed by the Court.[190]

Proceedings to preserve evidence[191]

Subsequent trial[192]

Option 3

1. As a general rule, the accused should be present during the trial.

2. In exceptional circumstances, the Trial Chamber may, in the interests of justice [at the request of the Prosecutor] [proprio motu or at the request of one of the parties] order that the trial proceed in the absence of the accused, if the latter, having been duly informed of the opening of the trial:

(a) Requests to be excused from appearing for reasons of serious ill-health;

(b) Disrupts the trial;

(c) Does not appear on the day of the hearing;

(d) under detention has, when summoned for the date of the trial, refused to appear without good reason, and made it particularly difficult to bring him to the Court; or

In the event that the accused is convicted following a trial held in his absence, the Trial Chamber may issue a warrant for the arrest and transfer of the accused for the purposes of executing the judgement. The decision taken under the provisions of this paragraph shall be communicated to the accused and may be appealed.

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[190] This provision follows paragraph 3 of the ILC draft, except that it omits subparagraph (a), regarding steps to inform the accused of the charges. This is unnecessary under this option since a trial in absentia is permitted only if the accused was present at the commencement of the trial, a stage at which the indictment is to be read out.

[191] There is no separate proposal to preserve evidence for trial. This could be dealt with as part of pre-trial proceedings, and would not necessarily be confined to situations where the accused is absent.

[192] Under this option, there would be no second trial following a trial in absentia.

3. The Trial Chamber shall, if it makes an order under paragraph 2, ensure that the rights of the accused under this Statute are respected, and in particular:

(a) that all reasonable steps have been taken to inform the accused of the charge; and

(b) that the accused is legally represented, if necessary by a lawyer appointed by the Court.

4. When the accused has not been duly informed of the opening of the trial and when all reasonable steps have been taken to inform the accused of the charges, the Trial Chamber may also, in very exceptional circumstances, [at the request of the Prosecutor] [proprio motu or at the request of one of the parties], order that the trial proceed in the absence of the accused when required in the interests of justice or the interests of the victims.

The accused may not then be represented by a lawyer of the accused's choosing, but the judge presiding over the Trial Chamber may appoint a lawyer on his own motion.

When the accused, having been judged in accordance with the above provisions, is taken prisoner or is arrested, the decisions taken in his absence by the Trial Chamber shall be null and void in all their provisions. The evidence submitted during the trial held in the absence of the accused may not be used, during the second trial, to establish the charges levelled against the accused, except where it is impossible for the depositions to be made a second time or where the evidence cannot again be produced.

Nevertheless, the accused may agree to the decision if the sentence pronounced in his absence is less than or equal to 10 years of imprisonment.

Option 4

1. The accused shall have the right to be present at the trial, unless the Trial Chamber, having heard such submissions and evidence as it deems necessary, concludes that the absence of the accused is deliberate.

2.[193] The Trial Chamber shall, if it makes an order under (paragraph 2), ensure that the rights of the accused under this Statute are respected, and in particular:

(a) that all reasonable steps have been taken to inform the accused of the charge; and

(b) that the accused is legally represented, if necessary by a lawyer appointed by the Court.

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[193] This is paragraph 3 of the ILC text, which requires consequential adjustments to be harmonized with the text of this Option.

Article 57[38][194]

Functions and powers of the Trial Chamber

1. At the commencement of the trial, the Trial Chamber shall:

(a) have the indictment read;

(b) ensure that articles 51[27] (5) (b) and 54[30] have been complied with sufficiently in advance of the trial to enable adequate preparation of the defence;

(c) satisfy itself that the other rights of the accused under this Statute and the Rules have been respected;

(d) allow the accused to enter a plea of not guilty or to make an admission of guilt before the Trial Chamber [and should the accused fail to do so, enter a plea of not guilty on his or her behalf].

2. The Chamber shall ensure that a trial is fair and expeditious and is conducted in accordance with this Statute and the Rules, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

[2 bis. The President of the Trial Chamber shall control and direct the hearing, and decide upon the manner by which evidence shall be produced by the parties. In all circumstances, the President shall have the duty to remain impartial.]

3. The Trial Chamber may, subject to the Rules, hear charges against more than one accused arising out of the same factual situation.

4. The trial shall be held in public, unless the Trial Chamber determines that certain proceedings be in closed session in accordance with article 43, or for the purpose of protecting confidential or sensitive information which is to be given in evidence. The deliberations of the Court shall remain confidential.

5. The Trial Chamber shall, subject to this Statute and the Rules, have, inter alia, the power on the application of a party or of its own motion to:

(a) issue a warrant for the arrest and transfer of an accused who is not already in the custody of the Court;

(a) bis exercise the same powers as the Pre-Trial Chamber regarding measures that restrict the liberty of a person;

(a) ter terminate or modify any warrants issued by the Pre-Trial Chamber;

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[194] A/AC.249/1997/L.8/Rev.1, p. 32.

(a) quater rule on any preliminary motions, and such ruling shall not be subject to interlocutory appeal except as provided for in the Rules;

N.B. See the last paragraph of article 12[36] (4)(Challenges to the jurisdiction of the Court or the admissibility of a case) for any possible inconsistency with subparagraph 5 (a) quater.

(b) require the attendance and testimony of witnesses, and the production of documents and other evidentiary materials by obtaining, if necessary, the assistance of States as provided in this Statute;

[(b) bis order the production of further evidence to that already collected prior to the trial or presented during the trial by the parties;]

(c) rule on the admissibility or relevance of evidence;

(d) protect confidential information; and

(e) maintain order in the course of a hearing.

The provisions of article 51[27], paragraph 5 (f), will apply mutatis mutandis for the purposes of orders sought under subparagraph (d) above.

5 bis. [The Trial Chamber may refer pre-trial issues under this article to the Pre-Trial Chamber for resolution.]

6. The Trial Chamber shall ensure that a complete record of the trial, which accurately reflects the proceedings, is maintained and preserved by the Registrar.

Article 58[38 bis][195]

Proceedings on an admission of guilt

1. Where the accused makes an admission of guilt under article 57[38], paragraph 1 (d), the Trial Chamber shall determine whether:

(a) the accused understands the nature and consequences of the admission of guilt and whether the admission is voluntarily made after sufficient consultation with defence counsel; and

(b) the admission of guilt is [firmly] supported by the facts of the case that are contained in:

(i) the indictment and in any supplementary materials presented by the Prosecutor, and which the accused admits; and

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[195] A/AC.249/1997/L.8/Rev.1, p. 32.

(ii) any other evidence, including the testimony of witnesses, presented by the Prosecutor or the accused.

2. Where the Trial Chamber is satisfied that the matters referred to in paragraph 1 are established, the Trial Chamber shall consider the admission of guilt, together with any additional evidence presented and admitted, as an admission of all the essential facts that are required to prove the crime to which the admission of guilt relates, and [may] [shall] convict the accused of that crime.

3. Where the Trial Chamber is not satisfied that the matters referred to in paragraph 1 are established, the Trial Chamber shall order that the trial be continued under the ordinary trial procedures provided by this Statute, and shall consider the admission of guilt not to have been made [and shall [may] remit the case to another Trial Chamber].

4. Where the Trial Chamber is of the opinion that a more complete presentation of the facts of the case is otherwise required in the interests of justice, in particular the interests of the victims, the Trial Chamber may request that the Prosecutor present additional evidence, including the testimony of witnesses, or may order that the trial be continued under the ordinary trial procedures provided by this Statute and, in the latter situation, shall consider the admission of guilt not to have been made [and shall [may] remit the case to another Trial Chamber].

5. Discussions between the Prosecutor and the defence regarding modification of the charges in the indictment, acceptance of the admission of guilt by the accused, or the penalty to be imposed shall not be legally binding on the Chamber.[196]

Article 59[40][197]

Presumption of innocence[198]

Everyone shall be presumed innocent until proved guilty in accordance with law. The onus is on the Prosecutor to establish the guilt of the accused beyond a reasonable doubt.[199]

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[196] Concerns were expressed about this paragraph and it was suggested that its formulation should continue to be examined.

[197] A/AC.249/1997/L.8/Rev.1, p. 33.

[198] The final provision of A/51/22, vol. II, p. 194, requiring a finding of guilt by a majority of the Trial Chamber, could be addressed in article 65[45].

[199] Reservations were expressed regarding the phrases "in accordance with law" and "beyond a reasonable doubt" contained in the ILC text.

Article 60[41][200]

Rights of the accused

1. In the determination of any charge under this Statute, the accused is entitled [, in addition to any rights afforded to a suspect under this Statute,] to a public hearing, having regard to [article 57[38] and] article 61[43],[201] and to a fair hearing by an independent and impartial tribunal, and to the following minimum guarantees in full equality:[202]

(a) to be informed promptly and in detail, [in a language that the accused understands] [in his own language], of the nature, cause and content of the charge;

(b) to have adequate time and facilities for the preparation of the defence, and to communicate freely with counsel of the accused's choosing, in confidence;[203]

(c) to be tried without [undue] [unreasonable] delay and to enjoy a speedy trial;

(d) subject to article 56[37] (2), to be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, including where the person is unable to secure counsel, and without payment if the accused lacks sufficient means to pay for such assistance;

(e) to examine, or have examined, the prosecution witnesses and to obtain the attendance and examination of witnesses for the defence under the same conditions as witnesses for the prosecution; [In addition the accused shall also be entitled to present any other evidence;]

(f) if any of the proceedings of or documents presented to the Court are not in a language the accused understands and speaks, to have, free of any cost,

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[200] A/AC.249/1997/L.8/Rev.1, p. 34.

[201] The matters relating to the exceptions concerning a public hearing could be addressed in article 57[38]. The matters in section A on pp. 195 and 196 of A/51/22, vol. II, could be considered under article 57[38].

[202] A proposal was made that, as to subparagraphs (a)-(g) of paragraph (1) of article 60[41] in the abbreviated compilation the wording of subparagraphs (a)-(g) of paragraph (3) of article 14 of the International Covenant on Civil and Political Rights should be used as such.

[203] The question of privileged communications could be addressed in the context of article 62[44].

the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness;

(g) not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence;

[[(h) to make an unsworn statement in his or her defence, if desired] [to declare in his or her defence, but [need] [shall] not take an oath to speak the truth]];

[(i) to request the Pre-Trial Chamber or, after the commencement of the trial, the Trial Chamber to seek the cooperation of a State Party pursuant to Part 9 [7] of this Statute to collect evidence for him/her;]

[(j) no reverse onus or duty of rebuttal shall be imposed on the accused.]

N.B. See also the second paragraph of article 61[43] (5) (Protection of the [accused], victims and witnesses [and their participation in the proceedings]) for any possible inconsistency with subparagraph 1 (j).

2. [Exculpatory evidence] [Evidence which shows or tends to show the innocence] [or mitigate the guilt] of the accused or may affect the credibility of prosecution evidence that becomes available to the Procuracy prior to the conclusion of the trial shall be [made available] [disclosed] to the defence. In case of doubt as to the application of this paragraph or as to the admissibility of the evidence, the Trial Chamber shall decide. [The provisions of article 51[27], paragraph 5 (f), will apply mutatis mutandis for the purposes of a decision made under this subparagraph.]

[3. The right of all persons to be secure in their homes and to secure their papers and effects against entries, searches and seizures shall not be impaired by the Court except upon warrant issued by the [Court] [Pre-Trial Chamber], on the request of the Prosecutor, in accordance with Part 9[7] or the Rules of the Court, for adequate cause and particularly describing the place to be searched and things to be seized, or except on such grounds and in accordance with such procedures as are established by the Rules of the Court.]

[4. No person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, without due process of law.][204]

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[204] The rights addressed in paragraphs 3 and 4, which are of a general nature, should perhaps be located in another part of the Statute. In addition, paragraph 4 could be reformulated.

Article 61[43][205]

Protection of the [accused], victims and witnesses
[and their participation in the proceedings]

1. The Court shall take the necessary measures available to it to protect the accused, victims and witnesses and may to that end conduct closed proceedings or allow the presentation of evidence by electronic or other special means.

Notwithstanding the principle of public hearings, the Court may order that the proceedings be closed, in the interest of the accused, the victims or the witnesses. [In camera hearings are mandatory when they are requested by an accused who was a minor at the time of the commission of the acts or at the request of a victim of sexual violence.]

N.B. To avoid repetition, the proposals under this paragraph may be merged to read as follows:

1. The Court shall take the necessary measures available to it to protect the accused, victims and witnesses. Notwithstanding the principle of public hearings, the Court may to that end conduct closed proceedings or allow the presentation of evidence by electronic or other special means. [In camera hearings are mandatory when they are requested by an accused who was a minor at the time of the commission of the acts or by a victim of sexual violence.]

2. [The Prosecutor shall, in ensuring the effective investigation and prosecution of crimes, respect and take appropriate measures to protect the privacy, physical and psychological well-being, dignity and security of victims and witnesses, having regard to all relevant factors, including age, gender and health, and the nature of the crime, in particular, whether the crime involves sexual or gender violence. These measures will be consistent with the rights of the accused.]

N.B. See also article 47[26] (2) (d bis) (Investigation of alleged crimes).

3. The Court shall take such measures as are necessary to ensure the safety, physical and psychological well-being, dignity and privacy of victims and witnesses, at all stages of the process, including, but not limited to, victims and witnesses of sexual and gender violence. However, these measures [may not] [shall not] be [inconsistent with] [prejudicial to] the rights of the accused.

4. [The Court [shall] [may] permit the views and concerns of the victim to be presented and considered at appropriate stages of the proceedings where their personal interests are affected in a manner which is consistent with the rights of the accused and a fair and impartial trial.][206]

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[205] A/AC.249/1997/L.8/Rev.1, p. 36.

[206] Some delegations thought that there should be further reflection on the paragraph.

[5. The Victims and Witnesses Unit, established under article 37[13] of this Statute, shall provide counselling and other assistance to victims and witnesses and advise the Prosecutor and the Court on appropriate measures of protection and other matters affecting their rights. These measures may extend to family members and others at risk on account of testimony given by such witnesses.][207]

[6. Notwithstanding paragraph 1 of article 51[27], if disclosure of any evidence and/or any of the particulars referred to in that paragraph will probably lead to the security of any witness or his/her family being gravely endangered, the Prosecutor may, for purposes of these proceedings, withhold such particulars and submit a summary of such evidence. Such a summary shall, for purposes of any later trial proceedings before the Court, be deemed to form part of the particulars of the indictment.]

[7. The rules of procedure shall include provisions giving effect to the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.]

[8. Legal representatives of victims of crimes have the right to participate in the proceedings with a view to presenting additional evidence needed to establish the basis of criminal responsibility as a foundation for their right to pursue civil compensation.]

N.B. This paragraph should be reviewed in the light of the discussions on article 66[45 bis] (Compensation to victims).

9. A State may make an application for necessary measures to be taken in respect of the protection of its servants or agents and the protection of sensitive information.

Article 62[44][208]

Evidence

1. Before testifying, each witness shall, in accordance with [or as excepted by] the Rules, give an undertaking as to the truthfulness of the evidence to be given by that witness.[209]

2. ~~1. bis~~ The testimony of witness at trial shall be given in person, except to the extent provided by the measures set forth in article 61[43] or in the rules

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[207] This issue will be addressed in the context of the organization of the Court.

[208] A/AC.249/1997/L.9/Rev.1, p. 30. There was no time to discuss in the Working Group paragraphs 3 to 6 of this article.

[209] Many delegations were of the view that the subject matter of this paragraph was more appropriate to be dealt with in the Rules of Procedure.

of evidence. These measures shall not be [prejudicial to] [inconsistent with] the rights of the accused.[210] [211]

3. [The Court has the authority and duty to call all evidence that it considers necessary for the determination of the truth.][212] [It] The Court may [also] require to be informed of the nature of any evidence before it is offered so that it may rule on its relevance or admissibility [after hearing the parties to the case]. [The Court may base its decision only on evidence submitted and discussed before it at the trial.][213]

4. The Court shall not require proof of facts of common knowledge but may take judicial notice of them.[214]

5. Evidence obtained by means of a serious violation of this Statute or of other rules of international law [or by means which cast substantial doubt on its reliability] [or whose admission is antithetical to, and would seriously damage, the integrity of the proceedings] [or by means which constitute a serious violation of internationally protected human rights] [or which have been collected in violation of the rights of the defence] shall not be admissible.[215]

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[210] It was suggested that article 61[43] could be drafted in a more detailed or descriptive manner.

[211] Some delegations expressed their concern about the possibility of allowing witnesses to testify without revealing personal data.

[212] This provision is meant to indicate that the relevant evidence cannot be determined by the parties alone, but has also to be determined by the Court's evaluation of the necessary depth of investigation and determination of the facts. This is, of course, basically a civil law concept, but delegations should bear in mind the additional historical dimension and truth-finding mission of the Court.

[213] These provisions might be better placed in article 65[45].

[214] It was questioned whether this provision was strictly necessary.

[215] This is an attempt to merge the additional proposals (paragraph 5, subparagraphs 2 to 5) concerning the admissibility of evidence with the ILC draft. It was felt that it would be better to refer to "rules of international law" than to single out the International Covenant on Civil and Political Rights, although this will of course be the main focus of this rule. The formula "internationally protected human rights" is intended to cover non-treaty standards as well and would therefore be broader than "international law".

[With regard to defences open to the accused under the general principles of criminal law in this Statute, the onus of proof shall be on the accused, subject to a preponderance of probability as applicable in civil cases.][216]

N.B. See also article 60[41] (1) (j) (Rights of the accused) for any possible inconsistency with the second indent of paragraph 5.

[6. The Court has, in case of evidence obtained by national authorities, to presume irrebuttably that the national authorities acted in accordance with the domestic provisions. The Rules of Court shall address the admissible motions against this presumption.]

Article 63[44 bis][217] [218] [219]

Offences against the integrity of the Court

1. The Court shall have jurisdiction over the following offences against the integrity of the Court:

(a) perjury committed during the course of its proceedings;

(b) influencing, impeding or retaliating against officials of the Court;

(c) obstructing the functions of the Court; and

(d) contempt committed during the course of its proceedings.

2. The Court may impose a term of imprisonment not exceeding [X months/years] [or a fine, or both].

3. The offences referred to in this article shall be tried before a Chamber other than the Chamber in which the alleged offences were committed. The rules shall determine the applicable procedure for these offences.

N.B. See the N.B. on article 5[20] (Crimes within the jurisdiction of the Court).

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[216] Such a provision might be better placed either under article 59[40] or in the context of "Grounds for excluding criminal responsibility" in the part dealing with general principles of criminal law.

[217] Delegations favoured the options that the Court shall have jurisdiction over offences against its integrity but the precise formulation of this article must be further reflected upon. There was a view that these offences required further definition in the Statute. Some previous proposals in this respect may be found on pages 44 to 46 of the abbreviated compilation of August 1997.

[218] A/AC.249/1997/L.9/Rev.1, p. 31.

[219] Additional discussions are needed on this article.

[Article 64[44 ter][220] [221]

Confidential information

N.B. This title is suggested in case the article is retained.

1. Any person heard or examined by the Trial Chamber may invoke restrictions provided for in his national law and designed to prevent the disclosure of confidential information connected with national defence or national security.

2. The Trial Chamber may ask the State of which the persons being heard or examined are nationals whether it confirms their claim to be bound to secrecy.

If the State confirms to the Trial Chamber that an obligation of secrecy exists, the Chamber shall note this fact.

3. The provisions of the preceding paragraphs shall also apply to execution of a request for judicial assistance made under Part 9[7] of this Statute.]

Article 65[45][222]

Quorum and judgement[223] [224]

1. A quorum consists of [at least four] [all] members of the Trial Chamber. [The judgement shall be given only by judges who have been present at each stage of the trial before the Trial Chamber and throughout its deliberations.]

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[220] A/AC.249/1997/L.9/Rev.1, p. 32.

[221] Additional discussions are needed on this article.

[222] A/AC.249/1997/L.9/Rev.1, p. 32.

[223] The present text was put forward by individual delegations in order to simplify the existing text and to show more clearly which are the various options. The proposal does not constitute as such a new substantive proposal.

[224] Throughout this article, "Court" has been replaced with "Trial Chamber". Decisions by the Pre-Trial Chamber (as well as its composition) and by the Appeals Chamber are dealt with elsewhere. Furthermore, it is questionable whether this article should only address judgements or whether it should also cover other (procedural) decisions. As currently drafted, it only deals with judgements.

[1 bis. [The Trial Chamber's judgement shall be based on its evaluation of the evidence and the entire proceedings.] [The judgement shall not exceed the facts and circumstances described in the indictment or its amendment, if any.]][225]

2.

Option 1

The [decision] [judgement] shall be taken by [a majority] [at least three] of the judges.

Option 2

All judges must concur in a decision as to conviction [or acquittal] and at least three judges must concur as to the sentence to be imposed.

Option 3

All judges must concur in a decision as to conviction [or acquittal] as well as to the sentence to be imposed.

3.[226]

Option 1

If after a sufficient time for deliberation a Chamber which has been reduced to four judges is unable to agree on a decision, it may order a new trial.

Option 2

If the required majority for a decision as to conviction or the sentence to be imposed cannot be reached, the opinion which is more favourable to the accused shall prevail.

[3 bis. The Trial Chamber shall pronounce its findings separately for each charge in the indictment. If several accused are tried together, the Chamber shall rule separately on the case of each of them.]

4. The deliberations of the Trial Chamber shall remain [secret] [confidential].

5. The judgement shall be in writing and shall contain a full and reasoned statement of the findings [on the evidence] and conclusions. [It shall be the

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[225] This is a new paragraph addressing two proposals which are moved here from article 65[45](5) in the abbreviated compilation and from the revised article 62[44](3).

[226] This paragraph would only be necessary if majority decisions are allowed and a quorum could consist of an even number of judges.

sole judgement issued] [It may contain dissenting opinions], and shall be delivered in open court.

[Article 66[45 bis]

Compensation to victims]

N.B. This title is suggested in case the article is retained.

N.B. The following provisions of the draft Statute are also related to this issue:

Article 51[27] (4 ter) (Commencement of prosecution).

Article 61[43] (8) (Protection of the [accused], victims and witnesses [and their participation in the proceedings]).

Article 68[A] (d) (Applicable penalties).

Article 69[47 bis] (vi) (Penalties applicable to legal persons).

Article 72[47 ter] (c) (Fines [and assets] collected by the Court).

Article 85[58] (second paragraph) (General obligation regarding recognition [and enforcement] of judgements).

Article 86[59 ter] (1) (Enforcement of fines and forfeiture measures).

Proposals contained in A/51/22, vol. II and in DPs (1997)

N.B. At the request of the Chair of the Working Group on Procedural Matters during the last session (December), the delegations that submitted the proposals below agreed to consolidate them and submit a revised text for consideration by the Working Group at the March/April session.

Proposal 1

~~Compensation for the victims~~[227]

1. The Registrar shall transmit to the competent authorities of the States concerned the judgement by which the accused was found guilty of an offence which caused damage to the victim.

2. The victims or his successors and assigns may, in accordance with the applicable national law, institute proceedings in a national jurisdiction or any other competent institution in order to obtain compensation for the prejudice caused to them.

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[227] A/51/22, vol. II, p. 224.

3. The judgement of the Court shall be binding on the national jurisdictions of every State party as regards the criminal liability of the person convicted and the principles relating to compensation for damage caused to victims and the restitution of property unlawfully acquired by the person convicted.

Proposal 2

~~Compensation to victims~~[228]

1. Where necessary, the Trial Chamber shall also determine the scope and extent of the victimization and establish principles relating to compensation for damage caused to the victims and to restitution of property unlawfully acquired by the person convicted, in order to allow victims to rely on that judgement for the pursuit of appropriate forms of reparation, such as restitution, compensation and rehabilitation, either in national courts or through their governments, in accordance with national law.

2. If the national competent authorities are no longer able, due to their total or partial collapse or unavailability, to proceed upon the judgement, the Court shall do so directly.

Proposal 3

~~Reparations~~[229]

1. (a) The Trial Chamber shall, in accordance with this Statute and the Rules of the Court, determine whether a monetary award, or any other award by way of reparations, should be made against a convicted person to a victim or victims of a crime in respect of which that person has been convicted.

(b) A monetary award may be comprised of:

(i) a punitive element;

(ii) a compensatory element;

(iii) both.

(c) An order for reparations may include:

(i) an order for restitution of property by the convicted person to a victim of the crime(s) in question;

(ii) any other order which the Court considers appropriate.

2. In making an order under this article, the Trial Chamber shall also determine whether, in order to give effect to its order, it is necessary to

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[228] A/AC.249/1997/WG.4/DP.3.

[229] A/AC.249/1997/WG.4/DP.13.

request protective measures, including the tracing, freezing or seizure of proceeds, property and assets and instrumentalities of the person convicted, or of any assignee of his assets where the Trial Chamber is satisfied that there is prima facie evidence that the assignment was made in order to defeat any protective order which the Court might request.

3. Before making any award or orders under this Article, the Court shall take account of any written or oral representations made:

(a) by or on behalf of the convicted person;

(b) by or on behalf of any person directly affected by any order which the Trial Chamber may wish to make;

(c) by or on behalf of the victim or victims.

4. In appropriate cases, the Trial Chamber may, in accordance with the Rules of Court, require a victim to describe the basis on which compensation or any other order under this Article is sought.

5. The judgements of the Trial Chamber making awards or orders under this Article will be transmitted by the Registrar to the competent authorities of the State or States with which the convicted person appears to have a direct connection either by reason of nationality or domicile or habitual residence or by virtue of the location of the convicted person's assets.

6. A victim, or his successors or his assigns, may, in accordance with applicable national law, pursue their remedies under the relevant law. To that end, States parties shall take the necessary measures to ensure that judgements of the Trial Chamber have binding force.

Article 67[46]

Sentencing

N.B. This article as such was not considered by the Preparatory Committee in 1997.

ILC draft

1. In the event of a conviction, the Trial Chamber shall hold a further hearing to hear any evidence relevant to sentence, to allow the Prosecutor and the defence to make submissions and to consider the appropriate sentence to be imposed.

~~2. In imposing sentence, the Trial Chamber should take into account such factors as the gravity of the crime and the individual circumstances of the convicted person.~~

Other proposals contained in A/51/22, vol. II[230]

1. [In the event of a conviction, the Trial Chamber shall hold a further hearing [pre-sentencing hearing] to hear any evidence relevant to sentence, to allow the Prosecutor and the defence to make submissions and to consider the appropriate sentence to be imposed.] ~~[The Trial Chamber should take into account such factors as the gravity of the crime and the individual circumstances of the convicted person.]~~ [These submissions may go to aggravation, extenuation or mitigation evidence, or the issue of rehabilitation.]

1 bis. [At such hearing the Parties shall ordinarily present submissions in the following manner:

(a) presentation by the Prosecutor;

(b) presentation by the defence;

(c) prosecution rebuttal;

(d) defence surrebuttal;

(e) argument by the Prosecutor on sentence;

(f) argument by the defence on sentence.]

2. [The Trial Chamber may impose the penalties provided for in the Statute.]

~~3. [The Trial Chamber shall indicate whether multiple sentences shall be served consecutively or concurrently.]~~

4. [The sentence shall be pronounced in public and in the presence of the convicted person.]

N.B. The deleted texts seem to be redundant in view of similar provisions included in article 70[BCE] (Determination of the sentence), where they may be more appropriately placed.

[230] P. 226.

PART 7. PENALTIES

N.B. In the Working Group on Penalties there were no discussions on the structure of the articles. The following structure is proposed for consideration:

Article 68[A][231]

~~The penalties~~

Applicable penalties

N.B. This title is suggested for consideration.

The Court may impose on a person convicted under this Statute [one or more of the following penalties] [the following penalty]:

(a)[232] [a term of life imprisonment or imprisonment for a specified number of years;]

[a maximum term of imprisonment of [30] years;]

[a definite term of imprisonment between [20] and [40] years [, unless this is reduced according to the provisions of this Statute][233];]

[The Court may attach to the sentence of imprisonment a minimum period during which the convicted person may not be granted any [release under relevant provisions of Part 10 [8] of the Statute].]

[In the case of a convicted person under the age of 18 years at the time of the commission of the crime, a specified term of imprisonment of no more than 20 years];

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[231] A/AC.249/1997/L.9/Rev.1, p. 67.

[232] To meet concerns of several delegations regarding the severity of a life sentence or a long sentence of imprisonment, it was suggested that Part 10[8], article 89[60], should provide a mandatory mechanism by which the prisoner's sentence would be re-examined by the Court after a certain period of time, in order to determine whether he or she should be released. In this way, the Court could also ensure the uniform treatment of prisoners regardless of the State where they served their sentence.

[233] The view was expressed that if such a provision providing for minimum sentencing is included, there should be a reference to factors that may reduce the minimum sentence. In such a case, the list of relevant factors should be exhaustive. It was suggested that among those factors could be the following: (i) diminished mental capacity that falls short of exclusion of criminal responsibility; (ii) the age of the convicted person; (iii) as appropriate, duress; and (iv) the subsequent conduct of the convicted person.

[When imposing a penalty on a person under the age of 18 years [at the time of the commission of the crime], the Court shall determine the appropriate measures to ensure the rehabilitation of the offender][234]

N.B. The two preceding paragraphs should be harmonized with article 20[E] (Age of responsibility).

[(b) A fine [in addition to a sentence of imprisonment on conviction of a crime under article 5[20]]];[235]

[(c)

(i) [[disqualification from seeking public office for the person's term of imprisonment and any further period of time that may be imposed] [in the modality and to the extent that the penalty could be imposed in accordance with the laws of the State in which such a penalty is to be enforced];][236]

(ii)[237] a forfeiture of [instrumentalities of crime and] proceeds, property and assets obtained by criminal conduct, without prejudice to the rights of bona fide third parties. [When the whole or part of the [instrumentalities of crime or] proceeds,

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[234] The following proposals were made which should be treated either under age of responsibility or the jurisdiction of the Court:

"[The Court shall have no jurisdiction over those who were under the age of 18 years at the time they are alleged to have committed a crime which would otherwise come within the jurisdiction of the Court] [; however, under exceptional circumstances, the Court may exercise jurisdiction and impose a penalty on a person aged 16 to 18 years, provided it has determined that the person was capable of understanding the unlawfulness of his or her conduct at the time the crime was committed]."

[235] ~~A number of delegations suggested that penalties for procedural crimes be included in relevant provisions of the Statute, along the following lines: "on conviction of perjury or contempt of the Court, as an ordinary penalty or as a supplementary penalty in addition to a sentence of imprisonment"~~.

N.B. See article 63[44 bis] (Offences against the integrity of the Court).

[236] Some delegations held the view that such a provision would give rise to difficult issues of enforcement.

[237] The terms in this provision should be brought into line with similar terms used elsewhere in this Statute once those provisions are finalized.

property, assets mentioned in ... cannot be forfeited, a sum of money equivalent thereto may be collected.];[238]]

[(d) Appropriate forms of reparation]

[[without prejudice to the obligation on every State to provide reparation in respect of conduct engaging the responsibility of the State][239] [or reparation through any other international arrangement], appropriate forms of reparation [,[including] [such as] restitution, compensation and rehabilitation]][240]

N.B. If retained, subparagraph (d) should be examined in the context of the discussions on article 66[45 bis] (Compensation to victims).

[(e) (Death penalty)]

Option 1

[death penalty, as an option, in case of aggravating circumstances and when the Trial Chamber finds it necessary in the light of the gravity of the crime, the number of victims and the severity of the damage.]

Option 2

No provision on death penalty.

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[238] It was suggested that forfeiture not be included as a penalty, but instead be included as a mechanism which the Court would request States to use with regard to execution of an order for reparations. According to this view, a provision on forfeiture could be considered as a separate paragraph of this article or elsewhere in the Statute.

[239] It was suggested that there was no need for such a clause relating to State responsibility, since it was already dealt with in the context of rules on individual criminal responsibility (see A/AC.249/1997/L.5, article 17[B a. to d.], para. 4).

[240] A number of delegations suggested that the Statute should address the issue of reparations to victims and their families. Opinions were divided as to whether this issue should be dealt with in the context of penalties. It was suggested that it could usefully be dealt with within the framework of the Working Group on Procedural Matters. It was also noted that the issue of reparations had a bearing on rules of enforcement in Part 10[8]. A number of delegations expressed the view that there might be merit in dealing with these issues in a unified way focusing on all the issues related to compensation.

[Article 69[47 bis][241] [242] [243]

~~Legal persons~~

Penalties applicable to legal persons

N.B. This title is suggested for consideration if the article is retained.

A legal person shall incur one or more of the following penalties:

(i) fines;

[(ii) dissolution;]

[(iii) prohibition, for such period as determined by the Court, of the exercise of activities of any kind;]

[(iv) closure, for such a period as determined by the Court, of the premises used in the commission of the crime;]

[(v) forfeiture of [instrumentalities of crime and] proceeds, property and assets obtained by criminal conduct;[244]] [and]

[(vi) appropriate forms of reparation].[245]]

N.B. Subparagraph (vi) should be examined in the context of compensation to victims.

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[241] A/AC.249/1997/L.9/Rev.1, F on page 71.

[242] Inclusion of a provision on such penalties would depend on the outcome of considerations in the context of individual criminal responsibility for legal persons.

[243] It was suggested that such provisions may give rise to issues of enforcement in the context of Part 10[8].

[244] See footnote 238 concerning forfeiture for natural persons. There may be merit in adopting a unified approach in both provisions, including all relevant qualifications.

[245] See footnote 238 concerning reparation in the context of natural persons. There may be merit in adopting a unified approach in both provisions, including all relevant qualifications.

Article 70[BCE][246]

Determination of the sentence

N.B. This title is suggested for consideration.

~~Aggravating and mitigating circumstances~~

1. In determining the sentence, the Court shall, in accordance with the Rules of the Court, take into account such factors as the gravity of the crime and the individual circumstances of the convicted person.[247]

~~Prior detention~~

2. In imposing a sentence of imprisonment, the Court shall deduct the time, if any, previously spent in detention in accordance with an order of the Court. The Court may deduct any time otherwise spent in detention in connection with conduct underlying the crime.

N.B. See also article 13[42] (3) (Non bis in idem).

~~Sentences of imprisonment for multiple crimes~~

3. When a person had been convicted of more than one crime, the Court shall:

Option 1

[pronounce a single sentence of imprisonment [not exceeding the maximum sentence prescribed for the gravest crime] [, increased by half]]

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[246] A/AC.249/1997/L.9/Rev.1, B and C on page 70 and E. on page 71.

[247] It may be impossible to foresee all of the relevant aggravating and mitigating circumstances at this stage. Many delegations felt that factors should be elaborated and developed in the rules of the Court, while several other delegations expressed the view that a final decision on this approach would depend upon the mechanism agreed for adopting the Rules. Among the factors suggested by various delegations as having relevance were: the impact of the crime on the victims and their families; the extent of damage caused or the danger posed by the convicted person's conduct; the degree of participation of the convicted person in the commission of the crime; the circumstances falling short of exclusion of criminal responsibility such as substantially diminished mental capacity or, as appropriate, duress; the age of the convicted person; the social and economic condition of the convicted person; the motive for the commission of the crime; the subsequent conduct of the person who committed the crime; superior orders; the use of minors in the commission of the crime.

Option 2

[indicate whether multiple sentences of imprisonment shall be served consecutively or concurrently.]

[Article 71[D][248] [249]

Applicable national legal standards

Option 1

In determining the length of a term of imprisonment or the amount of a fine to be imposed, [or property to be forfeited,] the Court [may have regard to the penalties provided for by law of] [shall impose the highest penalty provided for by the law of either]:

(a) [the State of which the convicted person is a national];

(b) [the State where the crime was committed;] [or]

(c) [the State which had custody of and jurisdiction over the accused.]

[In cases where national law does not regulate a specific crime, the Court will apply penalties ascribed to analogous crimes in the same national law.]

Option 2

No provision on national legal standards.][250]

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[248] A/AC.249/1997/L.9/Rev.1, D on page 70.

[249] It was suggested that this issue should be dealt with only in the context of article 14[33] on applicable national laws. Another suggestion was to move this issue to section B above. Moreover, the view was held that this kind of provision should be avoided altogether.

[250] Consideration could be given to inserting an express provision to this effect.

[Article 72[47 ter][251] [252]

Fines [and assets] collected by the Court

Fines [and assets] collected by the Court may be transferred, by order of the Court, to one or more of the following:

[(a) [as a matter of priority,] a trust fund [established by the Secretary-General of the United Nations] or [administered by the Court] for the benefit of victims of the crime [and their families];]

[(b) a State the nationals of which were the victims of the crime;]

[(c) the Registrar, to defray the costs of the trial.]]

N.B. This article should be examined in the context of compensation to victims.

~~[Article H~~[253] [254]

~~Effect of the judgement. Compliance. Implementation~~

~~[(a) The judgement of the Court shall be binding on the national jurisdictions of every State Party as regards the criminal liability of the person convicted and the principles relating to compensation for damage caused to victims and the restitution of property acquired by the person convicted [and other forms of reparation ordered by the Court].~~

N.B. Paragraph (a) should be deleted as it is already reflected in the second paragraph of article 85[58] (General obligations regarding recognition and enforcement of judgements) and may be more appropriately placed there.

~~(b) For the purpose of enforcement of fines [or reparation] imposed by the Court, the Presidency may order the forced sale of any property of the person sentenced which is on the territory of a State Party.~~

~~For the same purpose, the Presidency may order the confiscation of any sum of money or securities belonging to the person sentenced.~~

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[251] A/AC.249/1997/L.9/Rev.1, G on page 72.

[252] It was suggested that there may be options other than (a) and (b) as to the manner in which fines or assets collected by the Court could be distributed to victims.

[253] A/AC.249/1997/L.9/Rev.1, H on page 72.

[254] ~~It was suggested that all the issues contained here, which include, inter alia, recognition of judgement, should be dealt with in the content of part 9 on enforcement of sentences.~~

N.B. The above text of paragraph (b) should be deleted as it is already reflected in article 88[59 ter](1) (Enforcement of fines and forfeiture measures) and may be more appropriately placed there.

~~Decisions by the Presidency are implemented by States Parties in conformity with their domestic laws.~~

~~[The provisions of this article shall apply to legal persons.]~~

N.B. The preceding two paragraphs have been moved to article 88[59 ter] (1) (Enforcement of fines and forfeiture measures).

PART 8. APPEAL AND REVIEW

N.B. The articles in this part will be considered by the Preparatory Committee at the March/April session.

Article 73[48][255]

Appeal against judgement or sentence[256]

1. A [decision] [conviction] under article 65[45] may be appealed [to the Appeals Chamber], in accordance with the Rules, as provided for below:

(a) The Prosecutor may make such an appeal [without any specified grounds;] [on the following grounds:

(i) procedural error,

(ii) error of fact, or

(iii) error of law;]

(b) The convicted person may make such an appeal [without any specified grounds.] [on the following grounds:

(i) procedural error,

(ii) error of fact, or

(iii) error of law.]

1 bis. A [decision] [sentence] under Part 7[article 47] may be appealed [to the Appeals Chamber], in accordance with the Rules, by the Prosecutor or the convicted person on the ground of disproportion between the crime and the sentence. [In the case of an appeal of sentence, the Appeals Chamber may also render a decision on conviction.]

1 ter.

Option 1

The Prosecutor or the convicted person may, in accordance with the Rules, appeal [to the Appeals Chamber] against a decision rendered in absentia under article 56[37].

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[255] A/AC.249/1997/L.9/Rev.1, pp. 35-37.

[256] The present text was put forward by individual delegations in order to simplify the existing text and to show more clearly which are the various options. The proposal does not as such constitute a new substantive proposal.

Option 2

The Prosecutor or the convicted person may not appeal against a decision rendered in absentia under article 56[37] except that an appeal against judgement given on the merits in the absence of the accused shall be allowed if the accused accepts the judgement or was represented during the trial before the Trial Chamber by defence counsel appointed by the accused.

2. Unless the Trial Chamber otherwise orders, a convicted person shall remain in custody pending an appeal.

[2 bis.

Option 1

In case of an acquittal, the accused shall be released immediately.

If, at the time the judgement is pronounced, the Prosecutor advises the Trial Chamber in open court of his or her intention to file notice of appeal, the Trial Chamber may, at the request of the Prosecutor, issue a warrant for the arrest of the acquitted person to take effect immediately.

The Trial Chamber shall not issue an arrest warrant unless it is satisfied that the acquitted person may not be readily returned to custody if judgement is reversed.

Option 2

(a) If the accused is acquitted, sentenced to payment of a fine or sentenced to a term of imprisonment already covered by the period in detention, the accused shall be released immediately unless he is retained for another case by the organs of the Court or by the judicial authorities of a State Party.

(b) In all other cases, the Trial Chamber may, if the circumstances justify prolongation of a measure of security, by a special reasoned decision, maintain the detention of the accused. In this case, so long as the judgement is not final and during appeal proceedings, if any, the convicted person shall remain in detention until such time as the period of detention equals the sentence handed down. However, the convicted person has the right to challenge custody by appealing at any time.]

[3. The sentence shall begin to run from the day it is pronounced. However, as soon as notice of appeal is given, the enforcement of the judgement shall thereupon be stayed until the decision on appeal has been delivered, the convicted person meanwhile remaining in detention.

If, by a previous decision of the Trial Chamber, the convicted person has been released, or is for any other reason at liberty, and he or she is not present when the judgement is pronounced, the Trial Chamber shall issue a warrant for his or her arrest.

Execution of the judgement shall be suspended during the period allowed for appeal and for the duration of the appeal proceedings.][257]

[4. The Appeals Chamber may hear interlocutory appeals on the grounds provided for in article 57[38].]

Article 74[49][258]

Proceedings on appeal

1. The Appeals Chamber has all the powers of the Trial Chamber.

[The Rules of Procedure and Evidence that govern proceedings in the Trial Chambers shall apply mutatis mutandis to proceedings in the Appeals Chamber.] [The Rules of Procedure and Evidence that govern proceedings in the Trial Chambers shall apply mutatis mutandis to proceedings provided by the preceding two paragraphs. Further rules that govern those proceedings shall be provided for in the Rules of Court.]

[On the motion of a party, the Appeals Chamber may authorize the presentation of new evidence, which was not available at the time of trial, if it considers that the interests of justice so require.][259]

2. If the Appeals Chamber finds that the proceedings appealed from were unfair or that the decision is vitiated by error of fact or law, it may:

(a) if the appeal is brought by the convicted person, reverse or amend the decision, or, if necessary, order a new trial;

(b) if the appeal is brought by the Prosecutor against an acquittal, order a new trial.

[Those defences shall only be admissible if already raised in the Trial Chamber or if resulting from the proceedings in that Chamber.]

3. If in an appeal against sentence the Chamber finds that the sentence is manifestly disproportionate to the crime, it may vary the sentence in accordance with Part 7[article 47].

4. The decision of the Chamber shall be taken by a majority of the judges, and shall be delivered in open court [on a date of which notice has been given to

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[257] These matters could instead be addressed in Part 7[article 47].

[258] A/AC.249/1997/L.9/Rev.1, pp. 37-38. The text of article 74[49] was not the subject of a draft revised abbreviated compilation even though it was introduced in the Working Group. Its text comes from the abbreviated compilation of August 1997.

[259] A/51/22, vol. II, p. 242, reformulation of section N.

the parties and counsel and at which they shall be entitled to be present]. Six judges constitute a quorum.

[The Appeals Chamber shall pronounce judgement on the basis of the record on appeal together with such additional evidence as it has authorized.]

[The judgement shall be accompanied or followed as soon as possible by a reasoned opinion in writing, to which separate or dissenting opinions may be appended.]

[The Appeals Chamber may rule only on objections formulated by the parties in their appeals. When the decision has been appealed only by the accused, it cannot be amended to his or her detriment.]

5. Subject to article 75[50], the decision of the Chamber shall be final.

[6. A sentence pronounced by the Appeals Chamber shall be enforced immediately.]

[7. Where the accused is not present when the judgement is due to be delivered, either as having been acquitted on all charges or for any other reason, the Appeals Chamber may deliver its judgement in the absence of the accused and shall, unless it pronounces his or her acquittal, order his or her arrest or surrender to the Court.]

Article 75[50][260]

Revision[261]

1. The convicted person [and, after his or her death, his spouse, her husband, his or her children, relatives or any persons having express instructions] or the Prosecutor may, in accordance with the Rules, apply to the [Presidency] [Court which rendered the original judgement] for revision of a [conviction] [final judgement in a criminal case][262] on the following grounds:

(a) that evidence has been discovered which was not available to the applicant at the time the [conviction] [final judgement] was pronounced or affirmed and which could have been a decisive factor in the conviction;

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[260] A/AC.249/1997/L.9/Rev.1, pp. 38-39.

[261] The present text was put forward by individual delegations in order to simplify the existing text and to show more clearly which are the various options. The proposal does not constitute as such a new substantive proposal.

[262] Apparently, the suggested modification implies that an acquittal would also allow an application for revision from the Prosecutor; this would represent a drastic change from the concept of revision adopted by the ILC draft.

[(b) it is proved that decisive evidence which was taken into account when passing the conviction does not possess the value which had been assigned to it because it is false, invalid, or has been forged or falsified;

(c) it is proved that one or more of the judges who participated in a conviction or in its confirmation has committed in that case a serious breach of his or her duties;

(d) a previous judgement on which the conviction was based has been annulled;

(e) a more benign penal law than the one applied in the sentence becomes retroactively applicable].

2. [[The Presidency] shall reject the application if it considers it unfounded.] [If the [Presidency] [Court which rendered the original judgement] [is of the view that the new evidence could lead to the revision of the conviction] [considers there are valid grounds for the application],

Option 1

it may:

(a) reconvene the Trial Chamber;

(b) constitute a new Trial Chamber; or

(c) refer the matter to the Appeals Chamber,

with a view to the Chamber determining, after hearing the parties, whether the new evidence should lead to a revision of the conviction.

Option 2

it shall annul the conviction and refer the accused to a Chamber at the same level as, but having a composition different from, that of the Chamber which handed down the annulled decision.

[Article 76[50 bis]

Compensation to a suspect/accused]

N.B. This title is suggested in case this article is retained.

N.B.

- **Article 53[29] (8) (Pre-trial detention or release) is also related to this issue.**

- **Consideration should be given to the placement of this article, if retained.**

Proposals contained in A/51/22, vol. II and DPs (1997)

Proposal 1[263]

Compensation

1. The Court shall make compensation to those who were:

(a) pronounced innocent by an irrevocable adjudication;

(b) arrested or detained for the purpose of prosecution, although the prosecution against him did not eventually take place;

(c) arrested or detained but the lawfulness of that arrest or detention was denied in accordance with this Statute; or

(d) illegally inflicted losses upon by an officer of the Court intentionally or negligently in the course of performing his duties.

2. Procedures and criteria for compensation shall be provided in the Rules, including the expenses to be borne by a complainant State if that State lodged a complaint without sufficient reason.

Proposal 2[264]

The Appeals Chamber may grant compensation to a person who was held in pre-trial detention during proceedings against him that have concluded with a final decision of acquittal. The compensations shall be based on the prejudice caused to him by such detention.

If the Preliminary Investigations Chamber decides to release the person concerned because his arrest or detention was unlawful, it may award him compensation.

Proposal 3[265]

Compensation in respect of arrest or detention

1. If a person was arrested and no indictment was filed against him or her, and the Trial Chamber finds that there was no basis for the arrest or the detention, or that there are other considerations to justify the compensation of that person, the Trial Chamber may make an order for the payment of compensation in respect of the arrest or detention and reimburse him or her for the costs of his or her defence in an amount to be fixed by the Trial Chamber;

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[263] A/51/22, vol. II, p. 206, reproduced in A/AC.249/1998/WG.7/CRP.1, p. 24.

[264] A/51/22, vol. II, p. 206.

[265] Non-Paper/WG.4/No. 1.

2. If a person was arrested or detained and the Trial Chamber finds that the arrest or detention were caused by a frivolous complaint not submitted in good faith, the Trial Chamber may order the complainant State after allowing it to present its arguments in the matter, to make compensation and to pay the costs of defence of the person so arrested or detained, in an amount to be fixed by the Trial Chamber.

Proposal 4[266]

Compensation for irregular or unjustified detention

The Court may award compensation to a person who was held in detention, based on the prejudice caused to him by such detention, when the proceedings against him have concluded with a decision:

- to release him because of the irregularity of the arrest or detention, or insufficient charges against him;

- of acquittal, which has become final;

- recognizing his innocence, following an application for revision,

unless it is demonstrated that he was responsible for a failure to produce new evidence or to reveal an unknown factor in good time.

[266] A/AC.249/1997/WG.4/DP.9.

PART 9. INTERNATIONAL COOPERATION AND JUDICIAL ASSISTANCE[267]

Article 77[51][268]

General obligation to cooperate

States Parties shall, in accordance with the provisions of this [Part] [Statute], fully cooperate with the Court[269] in its investigation and prosecution of crimes under this Statute. States Parties shall so cooperate without [undue] delay.

Article 78[52][270] [271]

[Requests for cooperation: general provisions]

1. Authorities competent to make and receive requests/Channels for communication of requests

(a) The Court shall have the authority to make requests to States Parties for cooperation. The requests shall be transmitted through the diplomatic

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[267] Articles 78[52], 80[53 bis], 81[54] and 82[55] contain virtually identical provisions, some of which should be harmonized.

[268] A/AC.249/1997/L.9/Rev.1, p. 41.

[269] "Court" throughout this Part is understood to include its constituent organs, including the Prosecutor, as defined in article 29[5]. Such a provision could be inserted elsewhere in the Statute.

N.B. See N.B. on article 29[5] (Organs of the Court).

[270] A/AC.249/1997/L.9/Rev.1, pp. 41-43.

[271] It was suggested that the provisions of article 80[53 bis], paragraph 3, and article 82[55], paragraph 7, concerning the protection of witnesses and victims should be combined in a single paragraph in article 78[52], which would read:

> "The Court may withhold, in accordance with article 61[43], from the requested State [or a State making a request to the Court under article 82[55] (6)], specific information about any victims, potential witnesses and their families if it considers that this is necessary to ensure their safety or physical and psychological well-being. Any information that is made available to a State under this part shall be provided and handled in a manner that protects the safety or physical or psychological well-being of any victims, potential witnesses or their families."

It was also suggested that the content of such a provision should be considered further.

channel or any other appropriate channel as may be designated by each State Party upon ratification, accession or approval. Such designation and subsequent changes shall be done in accordance with the Rules of Procedure.

(b) When appropriate, without prejudice to the provisions of paragraph 1 (a), requests may also be transmitted through the International Criminal Police Organization or any appropriate regional organization.

2. Language of requests[272]

Requests for cooperation [and supporting documents] shall be [either] in [an official language of the requested State [unless otherwise agreed]] [or in] [one of the working languages reflected in article 42[18], in accordance with the choice made by that State upon ratification, accession or approval].

[The legal effect of such request shall not be diminished if any supporting document is not in such working language provided that a brief summary of any such document in that working language is also submitted.]

3. Confidentiality of requests from the Court

The requested State shall keep confidential a request and any supporting documents, except to the extent that the disclosure is necessary for execution of the request.

4. Cooperation by non-States Parties[273]

[(a) The Court may [call on] [invite] any State not party to this Statute to provide assistance under this part on the basis of [comity,] an ad hoc arrangement, an agreement with such State [or any other appropriate basis].]

[(b) Where a State not party to this Statute [which has entered into an ad hoc arrangement or an agreement with the Court][274], fails to cooperate with requests under paragraph (a), thereby preventing the Court from performing its duties under this Statute, the Court may make a finding to that effect and refer the matter to [the Council of States Parties][275] [or] [the United Nations General Assembly] [or, where the Security Council referred the matter to the

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[272] The language to be used by States in their replies to the Court is dealt with under article 83[56].

[273] It was suggested that the issue of non-States Parties should be addressed in a separate article 77[51] bis.

[274] It was suggested that a reference to paragraph (a) would cover this concern.

[275] It was suggested that the referral be made to a standing committee of the Council of States Parties. This issue needs to be further addressed in Part 4.

Court,] [to the Security Council] [so that necessary measures may be taken to enable the Court to exercise its jurisdiction].[276]]

5. Cooperation of intergovernmental organizations

The Court may ask any intergovernmental organizations to provide information or documents. The Court may also ask for other forms of cooperation and assistance as may be agreed upon with such organizations and in accordance with their respective competencies and/or mandates.

6.[277] States Parties' failure to cooperate [comply]

Where a State Party fails to comply with a request by the Court contrary to the provisions of the Statute, thereby preventing the Court from performing its duties under this Statute, the Court may make a finding to that effect and refer the matter to [the Council of States Parties][278] [or] [the United Nations General Assembly] [or, where the Security Council referred the matter to the Court] [to the Security Council] [so that necessary measures may be taken to enable the Court to exercise its jurisdiction].[279]

N.B. In view of the length of the article, the headings of the paragraphs are retained pending a decision on the text of the article. Consideration may be given to dividing the article into three as follows:

- **paragraphs 1 to 3;**
- **paragraphs 4 and 5;**
- **paragraph 6.**

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[276] The question of "necessary measures" has to be further examined.

[277] It was suggested that this paragraph should be inserted in article 77[51].

[278] It was suggested that the referral be made to a standing committee of the Council of States Parties. This issue needs to be further addressed in the organization of the Court.

[279] The question of "necessary measures" has to be further examined.

Article 79[53][280]

[Surrender] [Transfer] [Extradition] of persons[281] to the Court

1. The Court may transmit a request for the arrest and [surrender] [transfer] [extradition] of a person, along with the supporting material outlined in article 80[53 bis], to any State on the territory of which that person may be found, and shall request the cooperation of that State in the arrest and [surrender] [transfer] [extradition] of such person. States Parties shall, in accordance with the provisions of this Part [and the procedure under their national law], comply with requests for arrest and [surrender] [transfer] [extradition] without [undue] delay.

[1 bis. The national law of a requested State shall govern the [conditions] [procedure] for granting or denying a request for [surrender] [transfer] [extradition] [except as otherwise provided in this Part].]

2.

[Option 1: No grounds for refusal.]

[Option 2: A State Party may deny a request for [surrender] [transfer] [extradition] only if:[282]

(a) with respect to a crime under [article 5[20] (b) through (e)] [article 5[20] (e)], it has not accepted the jurisdiction of the Court;

[(b) the person is a national of the requested State;][283]

(c) the person has been investigated or has been proceeded against, convicted or acquitted in the requested State or another State for the offence for which his [surrender] [transfer] [extradition] is sought [, except that a request may not be denied if the Court has determined that the case is admissible under article 11[35]];

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[280] A/AC.249/1997/L.9/Rev.1, pp. 43-48.

[281] The term "persons" is understood to include "suspects", "accused" and "convicted persons". [The term "suspect" means a person who is the subject of a pre-indictment arrest warrant.]

[282] There is no agreement on the list of grounds contained in this option.

[283] It was suggested that even if a person is a national of the requested State, this does not prevent that State from [transferring] [surrendering] [extraditing] the person to the Court if the latter guarantees that the national in question shall be returned to the requested State to serve the sentence pronounced by the Court (cf. article 86[59] (1)).

[(d) the information submitted in support of the request does not meet the minimum evidentiary requirements of the requested State, as set forth in article 80[53 bis], paragraph 1 (c);]

(e) compliance with the request would put it in breach of an existing obligation that arises from [a peremptory norm of] general international law [treaty] obligation undertaken to another State.][284]

N.B. The options in this subparagraph are not clear.

[2 bis. If a request for [surrender] [transfer] [extradition] is denied, the requested State Party shall promptly inform the Court of the reasons for such denial.]

3. Application to the Court to set aside [surrender] [transfer] [extradition]

A State Party [having received a request under paragraph 1 may, in accordance with the Rules[285]] [may, in [...] days of receiving a request under paragraph 1], file a written application with the Court to [set aside] [withdraw] the request on specified grounds [including those mentioned in articles 11[35] and 13[42]]. Pending a decision of the Court on the application, the State concerned may delay complying with the request but shall take appropriate measures [as may be available] to ensure the compliance with the request after a decision of the Court to reject the application.

4. Parallel requests from the Court and State(s)

Option 1

(a) A State Party [which has accepted the jurisdiction of the Court] [, if it is a party to the treaty covered by [article 5[20] (e)] with respect to the crime,] shall [, as far as possible,] give priority to a request from the Court under paragraph 1 over requests for extradition from other States [Parties].

(b) If the requested State also receives a request from a non-State Party to which it is bound by an extradition agreement for the extradition of the same person, either for the same offence or for a different offence for which the Court is seeking the person's [surrender] [transfer] [extradition], the requested State shall determine whether to [surrender] [transfer] [extradite] the person to the Court or to extradite the person to the State. In making its decision the requested State shall consider all relevant factors, including but not limited to:

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[284] It was suggested that the following ground for refusal should be included: when the imposition or the execution of punishment for the offence for which surrender is requested would be barred by reasons prescribed under the law of the requested State if the requested State were to have jurisdiction over the offence.

[285] Questions dealing with the consequences of lapse of time will be addressed in the Rules.

(i) the respective dates of the requests;

(ii) if the offences are different, the nature and gravity of the offences;

(iii) the interests of the State requesting extradition, including, where relevant, whether the offence was committed in its territory and the nationality of the victims of the offence; and

(iv) the possibility of subsequent [surrender] [transfer] [extradition] or extradition between the Court and the State requesting extradition.

Option 2

(a) If the requested State also receives a request from a [State] [State Party] [to which it is bound by an extradition agreement] for the extradition of the same person, either for the same offence or for a different offence for which the Court is seeking the person's [surrender] [transfer] [extradition], the appropriate authority of the requested State shall determine whether to [surrender] [transfer] [extradite] the person to the Court or to extradite the person to the State. In making its decision the requested State shall consider all relevant factors, including but not limited to:

(i) whether the extradition request was made pursuant to a treaty;

(ii) the respective dates of the requests;

(iii) if the offences are different, the nature and gravity of the offences;

(iv) the interests of the State requesting extradition, including, where relevant, whether the offence was committed in its territory and the nationality of the victims of the offence; and

(v) the possibility of subsequent [surrender] [transfer] or extradition between the Court and the State requesting extradition.

(b) The requested State may not, however, deny a request for the [surrender] [transfer] [extradition] made under this article in deference to another State's request for extradition of the same person for the same offence if the State requesting extradition is a State Party and the Court has ruled the case before it is admissible, and its decision took into consideration the proceedings in that State which gave rise to its extradition request.

Option 3

(a) Subject to paragraph (b), a State Party [shall] [may] accord priority to a request by a State over a request by the Court for the extradition, transfer or surrender of a person to the requesting State under the provisions of any existing bilateral or multilateral agreement.

(b) A State Party shall however accord priority to requests from the Court over a request by a State where the Court has [positively] determined pursuant to article 11[35] that the requesting State is unwilling or unable genuinely to

carry out the investigation or prosecution of the case for which extradition, transfer or surrender is sought.

[5. Proceeding in requested State

Where the law of the requested State so requires, the person whose [surrender] [transfer] [extradition] is sought shall be entitled to challenge the request for arrest and [surrender] [transfer] [extradition] in the court of the requested State on [only] the following grounds:

[(a) lack of jurisdiction of the Court;]

[(b) non bis in idem; or]

[(c) the evidence submitted in support of the request does not meet the evidentiary requirements of the requested State as set forth in article 80[53 bis], paragraph 1 (b) (v) and (c) (ii).]]

6. Delayed or temporary [surrender] [transfer] [extradition]

If the person sought is being proceeded against or is serving a sentence in the requested State for an offence different from that for which [surrender] [transfer] [extradition] to the Court is sought, the requested State, after making its decision to grant the request, may:

(a) temporarily [surrender] [transfer] [extradite] the person to the Court and in that case, the Court shall return the person to that State after the completion of the trial or as otherwise agreed; or

(b) [with the consent of the Court [Pre-Trial Chamber] which shall rule after having heard the Prosecutor] postpone the [surrender] [transfer] [extradition] of the person until the completion or abandonment of the prosecution [or completion of service of the sentence].[286]

[7. Extradite or prosecute obligation[287]

(a) In the case of a crime to which article 5[20] (e) applies, the requested State [, if it is a party to the treaty in question but has not accepted the Court's jurisdiction with respect to that crime,] shall, where it decides not to [surrender] [transfer] [extradite] the accused to the Court, promptly take all necessary steps to extradite the accused to a State having requested extradition or [at the request of the Court] refer the case [through proceedings in accordance with national laws] to its competent authorities for the purpose of prosecution.

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[286] If it is agreed that consent of the Court will be required for postponement, then the last set of brackets can be removed.

[287] The text of paragraph 7 (a) and (b) applies if there is a consent regime. If the Court has jurisdiction over core crimes and there is no consent regime, these provisions could be deleted.

[(b) In any other case, the requested State Party shall [consider whether it can], in accordance with its legal procedures, take steps to arrest and [surrender] [transfer] [extradite] the accused to the Court, or [whether it should take steps to extradite the accused to a State having requested extradition or [at the request of the Court] refer the case to its competent authorities for the purpose of prosecution.]

[(c) The [surrender] [transfer] [extradition] of an accused to the Court will constitute, as between States Parties which accept the jurisdiction of the Court with respect to the crime in question, compliance with a provision of any treaty requiring that a suspect be extradited or that the case be referred to the competent authorities of the requested State for the purpose of prosecution.]]

[8. Provision of evidence irrespective of [surrender] [transfer] [extradition]

[To the extent permitted under the law of the requested State and] without prejudice to the rights of third parties, all items found in the requested State [that have been acquired as a result of the alleged crime or] that may be required as evidence shall, upon request, be transmitted to the Court [if the [surrender] [transfer] [extradition] is granted on conditions to be determined by the Court] [even if the [surrender] [transfer] [extradition] of the person cannot be carried out]. [Any rights which third parties may have acquired in the said items shall be preserved where these rights exist. The property shall be returned without charge to the requested State as soon as possible after the trial.]]

N.B.

- **It would be more appropriate to deal with the issues raised in this paragraph in the context of article 82[55] (Other forms of cooperation [and judicial and legal [mutual] assistance]).**

- **Consideration may be given to dealing with some of the details in this paragraph in the Rules.**

9. Transit of [surrendered] [transferred] [extradited] person[288]

(a) A State Party shall authorize transportation under its national procedural law through its territory of a person being [surrendered] [transferred] [extradited] to the Court by another State. A request by the Court for transit shall be transmitted in accordance with article 78[52]. The request for transit shall contain a description of the person being transported, a brief statement of the facts of the case and the legal characterization and the warrant for arrest and [transfer] [surrender] [extradition]. A person in transit shall be detained in custody during the period of transit.

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[288] It has been suggested that this or other provisions could form the basis for a separate article. In addition, some felt that a number of details set forth in this text would be more appropriately regulated in the Rules.

[(b) No authorization is required where air transportation is used and no landing is scheduled on the territory of the State of transit.]

(c) If an unscheduled landing occurs on the territory of the State of transit, it may require a request for transit as provided for in subparagraph (a). The State of transit shall detain the person to be transported until the request for transit is received and the transit is effected, so long as the request is received within 96 hours of the unscheduled landing.

10. Costs

The costs associated with the [surrender] [transfer] [extradition] of a person shall be borne by the [Court] [requested State] [Court or the requested State depending upon where the cost concerned arises].

N.B. In view of the length of the article, the headings of the paragraphs are retained. Consideration may be given to dividing the article into shorter articles, without prejudice to their retention, as follows:

- **paragraphs 1 and 1 bis;**
- **paragraph 2 and 2 bis;**
- **paragraph 3;**
- **paragraph 4;**
- **paragraph 5;**
- **paragraph 6;**
- **paragraph 7;**
- **paragraph 8;**
- **paragraph 9;**
- **paragraph 10.**

Article 80[53 bis][289]

Contents of request for [surrender] [transfer] [extradition][290]

1. A request for arrest and [surrender] [transfer] [extradition] shall be made in writing. In urgent cases a request may be made by any medium capable of delivering a written record,[291] provided that a request shall be confirmed [if necessary] through the channel provided for in article 78[52]. The request shall contain or be supported by:

(a) information describing the person sought, sufficient to identify the person and information as to that person's probable location;

(b) in the case of a request for pre-indictment arrest and [surrender] [transfer] [extradition]:

(i) a copy of warrant for arrest;[292]

(ii) a statement of the reasons to believe the suspect may have committed a crime within the jurisdiction of the Court and that the Prosecutor expects to seek an indictment within [90] days;

(iii) a brief summary of the [essential] facts of the case;

(iv) a statement as to why pre-indictment arrest is urgent and necessary;[293]

(v) [such documents, statements, or other types of information regarding the commission of the offence and the person's role therein, which may be required by the laws of the requested State;] [however, in no event may the requested State's requirements be more burdensome than those applicable to requests for extradition pursuant to treaties with other States;]

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[289] A/AC.249/1997/L.9/Rev.1, pp. 48-50.

[290] Portions of this article might also be provided for in the Rules rather than in the Statute.

[291] Issues relating to the security of this type of transmission will have to be discussed.

[292] The question of authentication of a warrant of arrest will be dealt with in the Rules.

[293] Article 52[28] covers pre-indictment arrest, while this paragraph also addresses the form of a request for pre-indictment arrest. The text of these two provisions must be examined together to ensure that there are no inconsistencies or duplications.

(c) in the case of a request for post-indictment arrest and [surrender] [transfer] [extradition]:

(i) a copy of the warrant of arrest and indictment;

[(ii) such documents, statements, or other types of information regarding the commission of the offence and the accused's role therein which may be required by the laws of the requested State; [however, in no event may the requested State's requirements be more burdensome than those applicable to requests for extradition pursuant to treaties or other arrangements with other States];]

(d) in the case of a request for the arrest and [surrender] [transfer] [extradition] of a person already convicted:[294]

(i) a copy of any warrant of arrest for that person;

(ii) a copy of the judgement of conviction;

(iii) information to demonstrate that the person sought is the one referred to in the judgement of conviction;

(iv) [if the person sought has been sentenced,] a copy of the sentence imposed and a statement of any time already served and that remaining.

1 bis. A State Party shall notify the Court at the time of ratification, accession or approval whether it can [surrender] [transfer] [extradite] on the basis of a pre-indictment warrant and the information specified in paragraph 1 (b) or it can only [surrender] [transfer] [extradite] following [confirmation of indictment] [issuance of a post-indictment warrant] on the basis of the information in paragraph 1 (c).

[2. Where the requested State Party considers the information provided insufficient to allow it to comply with the request, it shall seek, without delay, additional information and may fix a reasonable time limit for the receipt thereof. [Any proceedings in the requested State may be continued, and the person sought may be detained, for such period as may be necessary to enable the Court to provide the additional information requested.] If the additional information is not provided within the reasonable time limit fixed by the requested State, the person may be released.]

[3. The Court may in accordance with article 61[43] withhold from the requested State specific information about any victims, potential witnesses and their families if it considers that it is necessary to ensure their safety or physical or psychological well-being. Any information that is made available under this article shall be provided and handled in a manner that protects the safety or

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[294] It was suggested that this paragraph is an enforcement-of-sentence issue to be treated in part 10.

physical or psychological well-being of any victims, potential witnesses and their families.][295]

N.B. This provision is similar to the text in articles 81[54] (2 bis) (Provisional arrest) and 82[55] (7) (b)(Other forms of cooperation [and judicial and legal [mutual] assistance]). Consideration may be given to combining them in a single article.

Article 81[54][296]

Provisional arrest[297]

1. In case of urgency, the Court may request the provisional arrest of the person sought pending presentation of the request for [surrender] [transfer] [extradition] and supporting documents under article 80[53 bis].

2. The request for provisional arrest shall [be made by any medium capable of delivering a written record and shall] contain:

(i) a description of the person sought and information regarding the probable location of such person;

(ii) a brief statement of the essential facts of the case, including, if possible, the time and location of the offence;

(iii) a statement of the existence of a warrant of arrest or a judgement of conviction against the person sought, and, if applicable, a description of the specific offence or offences with which the person has been charged or for which he has been convicted; and

(iv) a statement that a request for [surrender] [transfer] [extradition] of the person sought will follow.

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[295] This paragraph could also be included under article 78[52].

[296] A/AC.249/1997/L.9/Rev.1, pp. 51-52.

[297] ILC article 52 (1) (a) addresses provisional arrest, as well as search and seizure and other measures pertaining to mutual assistance. In order to present all proposals in a clear fashion, the present document treats provisional arrest in this article and the other matters in article 82[55]. ~~Article 28 provides for pre-indictment arrest under certain limited circumstances. To avoid confusion with the term of provisional arrest provided for in this article, it is for consideration whether the form of arrest in article 28 should be termed "provisional arrest". This article may have other implications for article 28~~.

N.B. The above text has been deleted because the form of arrest in article 52[28] (Arrest) is now called "pre-indictment arrest".

2 bis. The Court may withhold from the requested State specific information about any victims, potential witnesses and their families or close associates if it considers that it is necessary to ensure their safety or well-being. Any information that is provided under this article to the requested State shall be provided in a manner that protects the safety or well-being of any victims, potential witnesses and their families or close associates.

N.B. See the N.B. in article 80[53 bis](3) (Contents of request for [surrender] [transfer] [extradition]).

3. A person who is provisionally arrested may be discharged from custody upon the expiration of [ ][298] days from the date of provisional arrest if the requested State has not received the request for [surrender] [transfer] [extradition] and the supporting documents specified under article 80[53 bis]. However, the person may consent to [surrender] [transfer] [extradition] before the expiration of this period if the legislation of the requested State allows, in which case that State shall proceed to [surrender] [transfer] [extradite] the person to the Court as soon as possible.[299]

4. The fact that the person sought has been discharged from custody pursuant to paragraph 3 shall not prejudice the subsequent rearrest and [surrender] [transfer] [extradition] of that person if the request for [surrender] [transfer] [extradition] and supporting documents are delivered at a later date.

Article 82[55][300]

Other forms of cooperation [and judicial and legal [mutual] assistance][301]

1. States Parties shall, in accordance with the provisions of this Part [and their national [procedural] law], comply with requests for assistance by the Court for:

(a) the identification and whereabouts of persons or the location of items;

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[298] Some delegations have proposed a 30-day period, some a 40-day period and some a 60-day time period.

[299] It was suggested that the simplified surrender procedure should be the object of a separate paragraph, since it applies to both the provisional arrest stage and after a full surrender request has been submitted.

This paragraph could also be included in article 78[52].

[300] A/AC.249/1997/L.9/Rev.1, pp. 52-56.

[301] This issue has to be revisited after the title of Part 9[7] is confirmed.

(b) the taking of evidence, including testimony under oath, and the production of evidence, including expert opinions or reports necessary to the Court;

(c) the questioning of any suspect or accused;

(d) the service of documents, including judicial documents;

(e) facilitating the appearance of persons before the Court;

[(f) the temporary transfer of persons in custody, with their consent [which cannot be withdrawn], in order to provide testimony [or other assistance] to the Court;]

[(g) the conduct of on-site investigations and inspections[302] [with the consent of the requested State];]

[(h) the conduct of proceedings of the Court in its territory with the consent of the requested State;][303]

(i) the execution of searches and seizures;

(j) the provision of records and documents, including official records and documents;

(k) the protection of victims and witnesses and the integrity of evidence;

(l) the identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual ~~confiscation~~ forfeiture without prejudice to the rights of bona fide third parties;[304] and

(m) any other types of assistance [not prohibited by the law of the requested State].

[2. Grounds for refusal

Option 1

A State Party shall not deny a request for assistance from the Court.

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[302] This issue is also addressed in article 47[26] (2)(c).

[303] The relationship between subparagraphs (g) and (h) and article 83[56] (4) needs to be examined.

[304] The issue of whether the Court is to be vested with such powers is linked with article 68[A] in Part 7 on Penalties.

Option 2

A State Party may deny a request for assistance, in whole or in part, only if:[305]

(a) with respect to a crime [under [article 5[20] (b) through (e)] [article 5[20] (e)], it has not accepted the jurisdiction of the Court;

(b) the authorities of the requested State would be prohibited by its national laws from carrying out the action requested with regard to the investigation or prosecution of a similar offence in that State;

(c) execution of the request would seriously prejudice its national security, ordre public or other essential interests;

(c) bis the request concerns the production of any documents or disclosure of evidence which relates to its national [security] [defence];

(d) execution of the request would interfere with an ongoing investigation or prosecution in the requested State or in another State [or with a completed investigation or prosecution that might have led to an acquittal or conviction, except that a request may not be denied if the investigation or prosecution relates to the same matter which is the subject of the request and the Court has determined that the case is admissible under article 11[35]];

(e) compliance with the request would put it in breach of an existing [international law] [treaty] obligation undertaken to another [State] [non-State Party].]

[3. Before denying a request for assistance, the requested State shall consider whether the requested assistance can be provided subject to specified conditions, or whether the assistance can be provided at a later time or in an alternative manner, provided that if the Court or the Prosecutor accepts the assistance subject to conditions, it shall abide by them.]

4. If a request for assistance is denied, the requested State Party shall promptly inform the Court or the Prosecutor of the reasons for such denial.

[4 bis. If a requested State does not produce a document or disclose evidence under paragraph 2 (c) bis on the ground that it relates to its national defence, the Trial Chamber shall only make such inferences that relate to the guilt or innocence of the accused.][306]

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[305] The list of possible grounds for refusal is not an agreed list.

[306] Views have been expressed that consideration should be given to establishing a mechanism for dealing with such sensitive information.

5. Confidentiality[307]

(a) The Court shall ensure the confidentiality of documents and information except as required for the investigation and proceedings described in the request.

(b) The requested State may, when necessary, transmit documents or information to the Prosecutor on a confidential basis. The Prosecutor may then use them solely for the purpose of generating new evidence.

(c) The requested State may, on its own motion or at the request of the Prosecutor, subsequently consent to the disclosure of such documents or information. They may then be used as evidence pursuant to the provisions of Parts 5 [4] and 6 [5] of the Statute and related Rules.

6. Assistance by the Court

(a) The Court [may] [shall], upon request, cooperate with and provide assistance [within its competence] to a State Party conducting an investigation into or trial in respect of acts which constitute a crime under this Statute [or which constitute a serious crime under the national law of the requesting State].

(b)[308]

(i) The assistance provided under subparagraph (a) shall include, among others:

(1) the transmission of statements, documents or other types of evidence obtained in the course of an investigation or a trial conducted by the Court; and

(2) the questioning of any person detained by the Court;

(ii) In the case of assistance under subparagraph (b) (i) (1):

(1) If the documents or other types of evidence have been obtained with the assistance of a State, such transmission shall require the consent of that State;[309]

(2) If the statements, documents or other types of evidence have been provided by a witness or expert, such transmission shall be

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[307] Views have also been expressed that subparagraphs (b) and (c) should be addressed in the Rules.

[308] Views have been expressed that this subparagraph should be addressed in the Rules.

[309] The relationship with article 84[57] needs to be considered.

subject to the provisions of article 61[43][310] [and shall require the consent of that witness or expert];

(c) The Court may, under the conditions set out in this paragraph, grant a request for assistance under this paragraph from a non-State party.

7. Form and contents of the request

(a) Requests for [judicial and legal] [mutual] assistance shall:

(i) be made in writing. In urgent cases, a request may be made by any medium capable of delivering a written record, provided that it shall be confirmed [, if necessary,] through the channel provided for in article 78[52]; and

(ii) contain the following, as applicable:

(1) a brief statement of the purpose of the request and the assistance sought, including the legal basis and grounds for the request;

(2) as much detailed information as possible about the location or identification of any person or place that must be found or identified in order for the assistance sought to be provided;

(3) a brief description of the essential facts underlying the request;

(4) the reasons for and details of any procedure or requirement to be followed;

[(5) such information as may be required under the law of the requested State in order to execute the request;]

(6) any other information relevant to the assistance being sought.

(b) The Court may withhold, in accordance with article 61[43], from the requested State [or a State making a request under paragraph 6] specific information about any victims, potential witnesses and their families if it considers that this is necessary to ensure their safety or physical and psychological well-being. Any information that is made available under this article to the requested State shall be provided and handled in a manner that protects the safety or physical or psychological well-being of any victims, potential witnesses and their families.

N.B. See the N.B. in article 80[53 bis](3) (Contents of request for [surrender] [transfer] [extradition]).

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[310] This relates to the provisions on the protection of victims and witnesses.

N.B. Consideration may be given to dividing this article into shorter articles, without prejudice to their retention, as follows:

- **paragraph 1;**
- **paragraphs 2 to 4 bis;**
- **paragraph 5;**
- **paragraph 6;**
- **paragraph 7.**

Article 83[56][311]

Execution of requests under article 82[55]

1. Requests for assistance shall be executed in accordance with the law of the requested State [and, unless prohibited by such law, in the manner specified in the request, including following any procedures outlined therein or permitting persons specified in the request to be present at and assist in the execution process[312] [by its competent authorities]].

2. In the case of an urgent request, the documents or evidence produced in response shall, at the request of the Court, be sent urgently.[313]

3. Replies from States Parties, including any accompanying documents, [may be in the language of the requested State] [shall be in accordance with paragraph 2 of article 78[52]. The Court may also request the transmission of documents in their original language].

[4. The [Prosecutor] [Court] may [, if requested,] assist the authorities of the requested State with the execution of the request for judicial assistance [and may, with the consent of the requested State, carry out certain inquiries on its territory].][314]

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[311] A/AC.249/1997/L.9/Rev.1, pp. 55-58.

[312] There is a link between this provision and the empowerment provisions of paragraph 4.

[313] Views have been expressed that this should be addressed in the Rules.

[314] Views have been expressed that paragraph 1 is an alternative to this paragraph.

[4 bis. [For the purposes of paragraph 4,] the requested State shall, upon request, inform the Court of the time and place of execution of the request for assistance.][315]

5. (a) The ordinary costs for execution of requests in the territory of the requested State shall be borne by the requested State except for the following which should be borne by the Court:

(i) Costs associated with the travel and security of witnesses and experts or the transfer of persons in custody;

(ii) Costs of translation, interpretation and transcription;

(iii) The travel and subsistence costs of the Prosecutor, members of his office or any other member of the Court; and

(iv) The costs of any expert opinion or report requested by the Court.

(b) Where the execution of a request will result in extraordinary costs, [there shall be consultations to determine how those costs will be met] [those costs shall be met by the Court].

(c) The provisions in this paragraph shall apply with appropriate modifications to requests made to the Court for assistance.[316]

N.B.

- **Consideration may be given to whether this provision should constitute a separate article where all the provisions dealing with costs would be combined. See also article 79[53] (10) ([Surrender][Transfer][Extradition] of persons to the Court).**

- **Consideration may also be given to dealing with some of the details relating to the costs in the Rules.**

[6. (a) Witnesses or experts may not be compelled to testify at the seat of the Court.

[(b) If they do not wish to travel to the seat of the Court, their evidence shall be taken in the country in which they reside or in such other place as they may agree upon with the Court [in accordance with national requirements [and in compliance with international law standards][317]].

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[315] Views have been expressed that this should be addressed in the Rules.

[316] Similar provisions may have to be inserted elsewhere to address the situation where the Court renders assistance to States or States Parties.

[317] The exact formulation will depend on the formulation adopted for article 62[44].

(c) In order to guarantee the safety of witnesses and experts, any means of communication may be used to take their evidence while preserving their anonymity.[318]][319]

[(d) No witness or expert who appears before the Court may be prosecuted, detained or submitted to any restriction of personal freedom by the Court in respect of any acts [or omissions] that preceded the departure of that person from the requested State.]

7. Provisions allowing a person heard or examined by the Court under article [...] to invoke restrictions designed to prevent disclosure of confidential information connected with national defence or security also apply to the execution of requests for assistance under this article.

[Article 84[57]][320]

Rule of speciality

1. Limit on other proceedings against [surrendered] [transferred] [extradited] person

A person [surrendered] [transferred] [extradited] to the Court under this Statute shall not be:

(a) proceeded against, punished or detained for any criminal act other than that for which the person has been [surrendered] [transferred] [extradited];

(b) [surrendered] [transferred] [extradited] to another State in respect of any criminal act[321]

[except when he or she commits the criminal act after [extradition] [surrender] [transfer]].

2. Limit on other uses of evidence

Evidence provided by a State Party under this Statute shall [, if that State Party so requests,] not be used as evidence for any purpose other than

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[318] The protection of witnesses is also addressed in articles 47[26] and 61[43].

[319] Views have been expressed on the relationship between subparagraphs (b) and (c) and article 56[37] on trial in the presence of the accused.

[320] A/AC.249/1997/L.9/Rev.1, pp. 58-59.

[321] The issue of transfer, etc., from the State of enforcement of a sentence of imprisonment to a third State is addressed in article 86[59] (4).

that for which it was provided [unless this is necessary to preserve a right of the accused under article 60[41] (2)].

3. Waiver of rule by the requested State

The Court may request the State concerned to waive the requirements of paragraphs 1 or 2, for the reasons and purposes to be specified in the request. In the case of paragraph 1, this request shall be accompanied by an additional warrant of arrest and by a legal record of any statement made by the accused with respect to the offence.][322]

N.B. The headings of the paragraphs are retained pending a decision on the text of the article.

[322] These square brackets reflect the view that there should be no rule of speciality in the Statute.

PART 10. ENFORCEMENT[323]

Article 85[58][324]

General obligation regarding recognition [and enforcement] of judgements

States Parties [shall] [undertake to recognize] [[and to] enforce directly on their territory] [give effect to] the judgements of the Court [, in accordance with the provisions of this part].

[The judgements of the Court shall be binding on the national jurisdictions of every State Party as regards the criminal liability of the person convicted and the principles relating to compensation for damage caused to victims and the restitution of property acquired by the person convicted and other forms of reparation ordered by the Court, such as restitution, compensation and rehabilitation.][325]

N.B. This article should also be considered in the context of the discussions on article 66[45 bis] (Compensation to victims).

Article 86[59][326]

Role of States in enforcement [and supervision] of sentences of imprisonment

1. Obligation versus consent of States Parties[327]

Option 1

A sentence of imprisonment shall be served in a State designated by the [Court] [Presidency].

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[323] One delegation was of the view that this part deals with issues also relevant to judicial assistance and that there might be grounds for non-recognition or non-enforcement of judgements.

[324] A/AC.249/1997/L.9/Rev.1, p. 59.

[325] There was a question whether this sort of provision should be in article 65[45], part 7 [article 47] or in part 10.

[326] A/AC.249/1997/L.9/Rev.1, pp. 60-62.

[327] The issue arises as to whether provision should be made concerning whether non-States Parties should accept sentenced persons for imprisonment.

Option 2

(a) A sentence of imprisonment shall be served in a State designated by the [Court] [Presidency] from a list of States which have indicated to the Court their willingness to accept sentenced persons. [The State so designated shall promptly inform the [Court] [Presidency] whether it accepts the request.]

[(b)[328] A State may make its consent conditional [on the applicability of its domestic laws relating to pardon, conditional release and commutation of sentence, and on its administration of the sentence. In this case, the consent of the Court is not required to subsequent actions by that State in conformity with those laws, but the Court shall be given at least 45 days' notice of any decision which might materially affect the terms or extent of the imprisonment].]

1 bis.

(a) The [Court's] [Presidency's] designation of a State under paragraph 1 shall be governed by principles [of equitable [geographic distribution] [burden sharing]] to be elaborated by [the Permanent Committee of States Parties.][329] [However, no such designation shall be made with respect to the State where or against which the crime was committed or the State of which the convicted person or the victim is a national [, unless the [Court] [Presidency] explicitly decides otherwise for reasons of social rehabilitation].]

(b) In making a designation under paragraph 1, the [Court] [Presidency] shall allow the person sentenced to provide views on any concerns as to personal security or rehabilitation. However, the consent of the person is not required for the [Court] [Presidency] to designate a particular State for enforcement of the sentence.

1 ter.

If no State is designated under paragraph 1, the sentence of imprisonment shall be served in the prison facility made available by the host State, in conformity with and under the conditions as set out in the Host State Agreement, as referred to in article 3, paragraph 2.

2. Enforcement of the sentence[330]

(a) The sentence of imprisonment shall be binding on the States Parties, which may in no case modify it.

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[328] If retained, this provision will need to conform with provisions of article 89[60].

[329] This reflects a current proposal for the establishment of a Permanent Committee of States Parties.

[330] It was suggested that this paragraph should be moved to the beginning of the article.

(b) The Court alone shall have the right to decide any application for review of the [judgement] [sentence]. The State of enforcement shall not impede the sentenced person from making any such application.

3. Supervision and administration of sentence

(a) The enforcement of a sentence of imprisonment shall be subject to the supervision of the [Court] [Presidency] [, and the Court shall ensure that internationally recognized standards of treatment of prisoners are fully guaranteed].

(b)

Option 1

[The conditions of detention shall be governed by the law of the State of enforcement. [However, the [Court] [Presidency] may, on its own motion or at the request of the sentenced person, modify the conditions of detention of the sentenced person. The State of enforcement shall enforce the modified conditions of detention. The [Court] [Presidency] may also on its own motion, or at the request of the sentenced person or the State of enforcement, decide that the sentenced person be transferred to another State for the continued serving of the sentence [provided that State agrees].]

[Internationally recognized standards of treatment of prisoners shall be fully guaranteed by the State of enforcement.]

Option 2

[The conditions of detention shall be governed by the law of the State of enforcement, in accordance with internationally recognized minimum standards, but in any case not more or less favourable than those available to prisoners convicted of similar offences in the State of enforcement.]

N.B. The placement of the square brackets is unclear in subparagraph (b).

(c) Communications between persons sentenced and the Court shall be unimpeded [and confidential].

4. Transfer of the person upon completion of sentence

(a) Unless the State of enforcement agrees to permit the prisoner to remain in its territory following completion of sentence, the prisoner shall be released into the custody of the State of the person's nationality or another State that has agreed to receive the person.

(b) The costs involved in transporting the prisoner to another State under paragraph 1 shall be borne by the Court, unless the State of enforcement or the receiving State agree otherwise.

(c) [Unless prohibited by the provisions of article 84[57]] [with the consent of the Court as provided in article 87[59 bis]],[331] the State of enforcement may also, in accordance with its national law, extradite or otherwise surrender the prisoner to the State which has requested the extradition or surrender of the prisoner for purposes of trial or enforcement of a sentence.

N.B. Consideration may be given to dividing this article into shorter articles as follows:

- **paragraph 1 to 1 ter;**
- **paragraph 2;**
- **paragraph 3;**
- **paragraph 4.**

[Article 87[59 bis][332]

Limitation of prosecution/punishment for other offences[333]

1. A sentenced person in the custody of the State of enforcement shall not be subjected to prosecution or punishment [or extradition to a third State] for any conduct committed prior to delivery to the State of detention, unless such prosecution or punishment [or extradition] has been approved by the [Court] [Presidency] [at the request of the State of detention].

2. The [Court] [Presidency] shall rule on the matter after having heard the prisoner.

3. Paragraph 1 of this article shall cease to apply if the sentenced person remains more than 30 days on the territory of the State of enforcement after having served the full sentence imposed by the Court.]

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[331] There is a question as to whether the permissibility of re-extradition of the prisoner should be addressed in article 84[57] (Rule of Speciality) or in article 87[59 bis].

[332] A/AC.249/1997/L.9/Rev.1, p. 62.

[333] Consideration should be given to the relationship of this article to the rule of speciality, as found in article 84[57]. This article is also related to article 79[53], paragraph 6, regarding temporary or delayed surrender.

[Article 88[59 ter][334]

Enforcement of fines and forfeiture measures

1. States Parties shall [, in accordance with their national law,] enforce fines and forfeiture measures [and measures relating to compensation or [restitution] [reparation]][335] as fines and forfeiture measures [and measures relating to compensation or [restitution][reparation]] rendered by their national authorities.

[For the purpose of enforcement of fines, the [Court] [Presidency] may order the forced sale of any property of the person sentenced which is on the territory of a State Party. For the same purposes, the [Court] [Presidency] may order the forfeiture of proceeds, property and assets and instrumentalities of crimes belonging to the person sentenced.][336] [337]

[Decisions by the Presidency are implemented by States Parties in conformity with their domestic laws.

[The provisions of this article shall apply to legal persons.]]

N.B. The last two portions of paragraph 1 have been moved from the deleted article H (b) (Effect of the judgement. Compliance. Implementation), p. ...

2. Property, including the proceeds of the sale thereof, which is obtained by a State Party as a result of its enforcement of a judgement of the Court shall be handed over to the [Court] [Presidency] [which will dispose of that property in accordance with the provisions of article 72 [paragraph 3 of article 47].]

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[334] A/AC.249/1997/L.9/Rev.1, p. 63.

[335] References to fines, forfeiture, restitution or compensation, or similar terms, will depend on the range of sanctions and compensatory measures ultimately provided for in Part 7 [article 47].

N.B. This footnote should be reviewed in the context of the discussions on article 66[45 bis] (Compensation to victims)

[336] There is a question whether this provision concerns enforcement of sentences, or rather the powers of the Court to order particular measures relating to enforcement of fines or confiscation. If it is meant to refer to States enforcing specific orders relating to fines or confiscation, then paragraph 1 might be amended to make clear that that enforcement by States Parties would include "giving effect to orders of the Court relating to enforcement of fines or forfeitures, such as the seizure of particular property or the forced sale of property of the convicted person to satisfy a fine".

[337] There was a suggestion that this paragraph should be placed first.

Article 89[60][338] [339]

Pardon,[340] parole and commutation of sentences [early release]

Option 1[341]

1. The prisoner may apply to the [Court] [Presidency] for a [decision on] [ruling regarding the appropriateness of] [pardon,] parole or commutation of sentence, if under a generally applicable law of the State of enforcement, a person in the same circumstances who had been convicted for the same conduct by a court of that State would be eligible for [pardon,] parole or commutation of sentence.

Option 2

1. (a) The State of enforcement shall not release the prisoner before the expiry of the sentence as pronounced by the Court.

(b) The [Court] [Presidency] alone shall have the right to decide any application for [commutation of the sentence] [commutation of the sentence or parole] [commutation of the sentence, parole or [pardon]]. [If appropriate in the circumstances, parole may be granted after the prisoner has served:

(i) not less than 20 years in case of life imprisonment;

(ii) not less than two thirds of the term in case of imprisonment for a definite term.

Parole may be revoked when the parolee is convicted of having committed an offence while on parole, or has violated any condition of his parole.]

2. Procedures regarding an application for commutation of sentence [or parole [or pardon]] and the [Court's] [Presidency's] decision on such an application shall be governed by the Rules of Procedure.

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[338] In the discussion of the Working Group on Penalties, it was suggested that, to meet concerns of several delegations regarding the severity of a life sentence or a long sentence of imprisonment, article 89[60] should provide a mandatory mechanism by which the prisoner's sentence would be re-examined by the Court after a certain period of time, in order to determine whether he or she should be released. In this way, the Court could also ensure the uniform treatment of prisoners regardless of the State where they served their sentence.

[339] A/AC.249/1997/L.9/Rev.1, p. 64.

[340] A concern was expressed that pardon might involve political considerations which would not be appropriate for determination by the Court, so that the authority to decide on an application for pardon might better be vested in the Permanent Committee of States Parties.

[341] This is an abbreviation of article 60 of the ILC text.

[Article 90[60 bis][342]

Escape

In the event of an escape, the sentenced person shall, as soon as he has been arrested pursuant to a request of the Court under article 80[53 bis] (1) (d), be delivered to the State in which he was serving his sentence or to another place determined by the Court.]

[342] A/AC.249/1997/L.9/Rev.1, p. 65.

PART 11. FINAL CLAUSES

N.B. The articles in this part were not considered by the Preparatory Committee in 1997.

Article 91[A][343]

Settlement of disputes

1. Any dispute between two or more States Parties concerning the interpretation or application of this Statute which cannot be settled through negotiation within a reasonable time shall, at the request of any one of them, be submitted to arbitration. If, within six months from the date of the request for arbitration, the parties to the dispute are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice, by application, in conformity with the Statute of that Court. If one or more States Parties to the dispute has made a declaration in accordance with paragraph 2, the present paragraph shall apply to the other parties to the dispute as far as possible.

2. Each State may at the time of signature, ratification, acceptance or approval of this Statute or accession thereto declare that it does not consider itself bound by paragraph 1 of this article. The other States Parties shall not be bound by paragraph 1 of this article with respect to any State Party which has made such a declaration.

3. Any State which has made a declaration in accordance with paragraph 2 of this article may at any time withdraw that declaration by notification to the Secretary-General of the United Nations.

Article 92[B][344]

Reservations

No reservations may be made to this Statute.

Article 93[C][345]

Amendments

1. At any time after the entry into force of this Statute, any State Party may propose amendments thereto. The text of any proposed amendment shall be

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[343] A/AC.249/1998/L.11, p. 1.

[344] A/AC.249/1998/L.11, p. 2.

[345] A/AC.249/1998/L.11, p. 2.

submitted to the Registrar, who shall promptly circulate it to all States Parties.

2. A proposed amendment to this Statute shall be considered at the next Meeting of States Parties, provided that no consideration shall take place until [3] months after its circulation pursuant to paragraph 1.

3. The adoption of an amendment at a Meeting of States Parties shall require a [2/3] [3/4] majority of [all the States Parties] [those present and voting].

4. The Registrar shall transmit any amendment adopted at a Meeting of States Parties to the Secretary-General of the United Nations, who shall circulate it to all States Parties.

5. An amendment adopted at a Meeting of States Parties shall enter into force for all States Parties [60] days after instruments of acceptance have been deposited with the Secretary-General of the United Nations by [2/3] [3/4] of [all the States Parties] [those present and voting].

Article 94[D][346] [347]

Simplified amendment procedure

Modification of [articles ... or Part ...] shall be made subject to the following procedure:

(a) Any State Party may submit proposals for modifying [articles ... or Part ...], which shall be transmitted to the Registrar who shall promptly circulate such proposals to all States Parties for consideration;

(b) On behalf of the Court, the President may propose any modification of [articles ... or Part ...], which shall be transmitted to the Registrar who shall promptly circulate such proposals to all States Parties for consideration;

(c) [Five] [Ten] months after the circulation of proposals, they shall be deemed to have been adopted and the provisions amended accordingly unless within that period one third of the States Parties have objected thereto. The proposals shall then come into effect 30 days after their adoption.

OR

(c) Any proposals made under paragraphs (a) and (b) shall be referred to a Standing Committee of the States Parties, which shall be composed of [five] States Parties elected by the Meeting of States Parties. The Standing Committee shall make a recommendation after having considered the proposals. The

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[346] This article is intended to provide a simplified procedure for amending those provisions which might require adjustments to meet practical needs.

[347] A/AC.249/1998/L.11, pp. 2-3.

recommendation shall be circulated by the Registrar of the United Nations to all States Parties to the Statute. [Five] [Ten] months after the circulation of proposals, they shall be deemed to have been adopted and the provisions amended accordingly, unless within that period one third of the States Parties have objected thereto. The proposals shall then come into effect 30 days after their adoption.

Article 95[E][348]

Review of the Statute

1. At any time after the entry into force of this Statute, the Meeting of States Parties may decide, by a two-thirds majority [of those present and voting], to convene a special Meeting of States Parties to review the Statute.

2. Any amendment to the Statute proposed at such a Meeting of States Parties shall be subject to paragraphs 3 to 5 of article 93[C].

Article 96[F][349]

Signature, ratification, acceptance, approval or accession

1. This Statute shall be open for signature by all States in Rome, at the headquarters of the Food and Agriculture Organization of the United Nations, on 20 July 1998. Thereafter, it will remain open for signature in Rome at the Ministry of Foreign Affairs of Italy until 20 October 1998. After that date, the Statute shall remain open for signature in New York, at United Nations Headquarters, until 31 December 2000.

2. This Statute is subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations.

3. This Statute shall be open to accession by any State. Instruments of accession shall be deposited with the Secretary-General of the United Nations.

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[348] A/AC.249/1998/L.11, p. 3.

[349] A/AC.249/1998/L.11, p. 3.

Article 97[G][350]

Entry into force

1. This Statute shall enter into force on the [60th] day following the date of the deposit of the [...] instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations.

2. For each State ratifying, accepting, approving or acceding to the Statute after the deposit of the [...] instrument of ratification, acceptance, approval or accession, the Statute shall enter into force on the [60th] day after the deposit by such State of its instrument of ratification, acceptance, approval or accession.

Article 98[H][351]

Withdrawal

1. Any State Party may withdraw from this Statute by written notification to the Secretary-General of the United Nations.

2. Withdrawal shall take effect one year following the date on which notification is received by the Secretary-General of the United Nations. The withdrawal shall not affect any obligations of the withdrawing State under the Statute.

Article 99[I][352]

Authentic texts

The original of this Statute, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who shall send certified copies thereof to all States.

IN WITNESS WHEREOF, the undersigned, being duly authorized thereto by their respective Governments, have signed this Statute.

DONE, this 17th day of July 1998, at Rome.

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[350] A/AC.249/1998/L.11, p. 4.

[351] A/AC.249/1998/L.11, p. 4.

[352] A/AC.249/1998/L.11, p. 4.

III. SUPPLEMENTARY DOCUMENTS

A. FINAL ACT[353]

1. The Final Act of the Conference contains a summary of the background and proceedings of the Conference:

- An Introduction tracing the developments which led to the Conference;
- A list of participants;
- The officers and structure of the Conference;
- A summary of its organization, rules of procedure and proceedings.

2. The Final Act is not part of the Statute. It is drafted in the same languages as the Statute and is signed by the President of the Conference, the Executive Secretary and all participants wishing to do so. Special full powers will not be required for signature of the Final Act; credentials issued for the Conference are sufficient.

The Final Act may also include any other resolutions or decisions of the Conference, either in its main text or as annexes thereto

[353] A/AC.249/1998/L.11, p. 5.

B. ESTABLISHMENT OF A PREPARATORY COMMISSION[354]

1. If it is deemed necessary to establish a preparatory commission, this can best be done by means of a resolution to be adopted by the Conference. Such a resolution should form part of the Final Act.

2. Its text might read as follows:

"The Conference on the Establishment of an International Criminal Court,

"Having adopted the Statute of the International Criminal Court,

"Having decided to take all possible measures to ensure the coming into operation of the International Criminal Court without undue delay and to make the necessary arrangements for the commencement of its functions,

"Having decided that a preparatory commission should be established for the fulfilment of these purposes,

"Decides as follows:

"1. There is hereby established the Preparatory Commission for the International Criminal Court. Upon signature of or accession to the Statute by [ ] States, the Secretary-General of the United Nations shall convene the Commission.

"2. The Commission shall consist of representatives of States which have signed the Statute or have acceded to it. The representatives of other signatories of the Final Act may participate fully in the deliberations of the Commission as observers.

"3. The Commission shall elect its Chairman and other officers, adopt its rules of procedure and decide on its programme of work.

"4. The Commission shall:

(a) Make practical arrangements for the establishment and coming into operation of the Court;

(b) Prepare a relationship agreement between the [International Criminal] Court and the United Nations;

(c) Prepare a Headquarters Agreement;

(d) Prepare draft rules of procedure of the Court;

(e) Prepare staff regulations;

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[354] A/AC.249/1998/L.11, pp. 6-7.

(f) Prepare financial regulations;

(g) Prepare an agreement on the privileges and immunities of the [International Criminal] Court;

(h) Prepare a budget for first year(s);

(i) Prepare the rules of procedure of the Meeting of States Parties [and of any other organ established by the Statute].

"5. The Commission shall meet at the Headquarters of the United Nations.

"6. The Commission shall remain in existence until the conclusion of the first Meeting of the States Parties to the Statute.

"7. The Commission shall prepare a report on all matters within its mandate and submit it to the first Meeting of the States Parties to the Statute.

"8. The Secretary-General of the United Nations shall provide to the Commission such secretariat services as it may require.

"9. The Secretary-General of the United Nations shall bring this resolution to the attention of the General Assembly for any necessary action."